

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU**

In the Matter of)	
)	
Accelerating Wireline Broadband)	
Deployment by Removing Barriers to)	WC Docket No. 17-84
Infrastructure Investment)	
)	

**INITIAL COMMENTS IN RESPONSE TO THE COMMISSION'S
NOTICE OF PROPOSED RULEMAKING ON POLE ATTACHMENTS**

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EXECUTIVE SUMMARY

The Electric Utilities strongly support the Commission's goal of enabling faster and more predictable broadband deployment. There are two main steps the Commission should take to achieve this goal. First, the Commission should provide more control over communications space make-ready work to new attachers. For this reason, the Electric Utilities fully support the development and implementation of one-touch make-ready or expanded self-help remedies within the communications space. Second, the Commission should preserve and restore an incentive for electric utility pole owners to facilitate and expedite the pole access process—particularly where access will require expansion of capacity. For this reason, the Electric Utilities strongly oppose the Commission's proposals to further strip pole owners of cost recovery, and shift additional costs to electric ratepayers.

There are multiple stakeholders in pole attachment matters. Each has varying interests and motives. New attachers want access as fast as possible. Existing attachers want to delay access by the new entrant. The public wants reliable electricity, ubiquitous broadband, aesthetic consistency and minimal disturbance in the rights-of-way. Electric utility pole owners want properly engineered infrastructure and reasonable cost recovery. All stakeholder interests must be properly balanced in a manner that incentivizes cooperation and innovation. Any regulatory approach that favors one stakeholder works against the Commission's overarching goal of enabling faster and more predictable broadband deployment. To put it bluntly, if the Electric Utilities have no incentive to cooperate and innovate, no amount of heavy-handed regulation will make them cheerful participants in the process. As Chairman Pai recently observed: "The more heavily you regulate something, the less of it you're likely to get." Remarks of FCC Chairman Ajit Pai at the Nuwseum, "The Future of Internet Freedom," Washington, DC (April 26, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344590A1.pdf. So it is with the provision of pole space.

The NPRM, in a surprisingly few number of paragraphs, touches directly or indirectly on virtually every issue relating to the regulation of pole attachments. The Electric Utilities enthusiastically support those proposals that address the actual barriers to broadband deployment (such as slow-acting broadband competitors), but strenuously object to those proposals that merely place unrealistic expectations on the Electric Utilities, at greater risk to network safety and reliability and at greater expense to the electric ratepayers.

Though many of the specific issues raised in the NPRM are important to the Electric Utilities, the most important issues are as follows:

- Solving the deployment delays caused by existing communications attachers. This is the single greatest impediment to broadband deployment. And it is easy to understand. Why would AT&T or Charter be eager to accommodate someone like Google Fiber? The Electric Utilities support measures, including one-touch make-ready within the communications space, targeted to reduce or eliminate the access delays caused by existing

communications attachers. If the Commission can solve this problem, it can make massive strides in expediting broadband deployment.

- Preserving the cost sharing agreements between electric utilities and ILECs upon which jointly used infrastructure was constructed. The ILECs already have a regulatory remedy if they believe their long-standing contractual cost sharing commitments are unjust or unreasonable. The existing rule appropriately places the burden of proof on the ILECs, as the party seeking to avoid the cost-sharing commitments upon which the jointly used network of poles was constructed. The Electric Utilities strongly oppose the Commission’s proposal to shift this burden to the party seeking to uphold the terms of long-standing contractual arrangements.
- Retaining the existing 45-day period to respond to pole attachment requests. This 45-day period has been in place for more than 20 years. It is the critical period during which the Electric Utilities perform the necessary engineering analysis to determine whether a pole or pole line can accommodate a request for attachment, and if so, what make-ready work is required to accommodate the request. Shortening this period to 15 days, as proposed by the Commission, would require the Electric Utilities to truncate their engineering analysis, with consequences to the safety and reliability of the network—a problem for all stakeholders.
- Restoring the original meaning of “cost” as used in the telecom rate formula. The Commission’s inquiries into whether and how to decrease an attacher’s contributions to the capital cost of the network are headed in the wrong direction. Though the Commission is correct to call-out the 2015 Telecom Rate Order for its “awkward” interpretation of the term “cost,” the solution to this awkwardness is to restore the meaning of the term as originally understood by the Commission and all stakeholders. This not only would resolve the awkwardness noted by the Commission, but also would restore the incentives necessary to successful deployment of the next generation of advanced communications infrastructure.

More generally, the Electric Utilities are concerned with the breadth, depth and pace of the NPRM. Some of the proposals would have a chilling effect on the very cooperation and innovation required to deploy the next generation of advanced communications infrastructure. And the Commission has sought comment on virtually all aspects of pole attachment regulation (to say nothing of its copper retirement proposals) in a short time frame.

The Commission should take a more deliberate approach. The Commission should await the recommendations of the Broadband Deployment Advisory Committee before taking action. The Commission should balance the interests of all stakeholders and regulate (or not) in a way that encourages and incentivizes innovation and cooperation on deployment solutions. Deployment of the next generation of advanced communications infrastructure depends upon it. The Electric Utilities look forward to engaging further with the Commission in this important effort.

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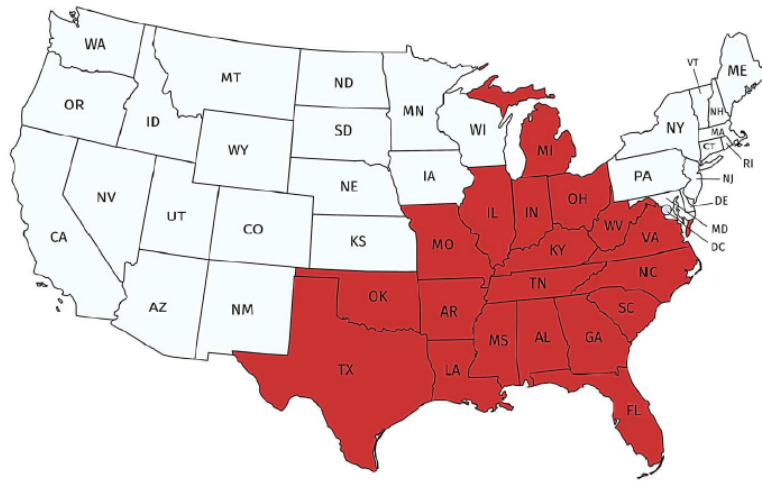
INITIAL COMMENTS OF THE ELECTRIC UTILITIES

Ameren Corporation, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company (the “Electric Utilities”) respectfully submit the following comments in response to the Commission’s Notice of Proposed Rulemaking on pole attachments in the above-referenced docket.¹

INTRODUCTION

The Electric Utilities, either directly or through their operating company subsidiaries and affiliates, provide electric service to customers in 19 states and numerous metropolitan areas. The Electric Utilities collectively own and maintain approximately 21,000,000 distribution poles, many of which host third-party attachments. The Electric Utilities operate in 13 of the 30 states in which pole attachments are directly regulated by the Commission. *See States that Have Certified that They Regulate Pole Attachments*, WC Docket No. 10-101 (May 19, 2010).

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* WC Docket No. 17-84, Notice of Proposed Rulemaking, 82 Fed. Reg. 93, 22453 (May 16, 2017) (the “NPRM”).



Ameren Corporation (“Ameren”) is an electric utility holding company. Through its operating company subsidiaries—Ameren Illinois Company d/b/a Ameren Illinois and Union Electric Company d/b/a Ameren Missouri—Ameren owns electric distribution infrastructure, including a substantial number of utility poles, in Illinois and Missouri. Ameren’s operating companies provide electric power service to more than 2.3 million customers throughout a 64,000 square mile service territory in Missouri and Illinois.

American Electric Power Service Corporation (“AEP Service Corp.”) is a wholly-owned subsidiary of American Electric Power Company, Inc. (“AEP”). AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP is one of the largest investor-owned electric utilities in the United States with more than 5 million customers linked to its electricity transmission and distribution grid covering 197,500 square miles. AEP, through its operating company subsidiaries, owns and operates critical electric distribution infrastructure in eleven states across the Midwest and Southeast: Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.

Duke Energy Corporation (“Duke”) is an electric power holding company. Through its operating company subsidiaries—Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Duke Energy Florida, LLC, Duke Energy Kentucky, Inc., Duke Energy Indiana, Inc. and Duke Energy Ohio, Inc.—Duke owns electric distribution infrastructure, including a substantial number of utility poles, in Florida, Indiana, Kentucky, North Carolina, Ohio, and South Carolina.

Entergy Corporation (“Entergy”) is an electric utility holding company. Through its operating company subsidiaries—Entergy Arkansas, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.—Entergy owns electric distribution infrastructure, including a substantial number of utility poles, in Arkansas, Louisiana, Mississippi and Texas.

Oncor Electric Delivery Company LLC (“Oncor”) is an electric utility serving more than 400 cities and 91 counties in Texas, nearly one-third of the state’s geographic area and in the U.S.’s highest-growth region in electric demand, according to the North American Electric Reliability Council (NERC). Oncor’s current service area includes the Dallas-Fort Worth metro area, as well as Midland/Odessa, North Austin, Round Rock, Killeen, Waco, Wichita Falls and Tyler. Oncor operates the largest distribution and transmission system in Texas, providing power to approximately 10 million end use customers and more than 3.3 million electric delivery points over more than 121,000 miles of distribution and transmission lines.

Southern Company (“Southern”) is one of the largest generators of electricity in the nation, serving both regulated and competitive markets across the southeastern United States. Southern, through four retail operating companies—Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company—supplies energy to approximately 4.2

million customers in a 120,000 square-mile service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida.

Tampa Electric Company (“Tampa Electric”), headquartered in Tampa, Florida, has supplied the Tampa Bay area with electricity since 1899. Tampa Electric’s service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas Counties. Tampa Electric serves nearly 670,000 residential, commercial and industrial customers. Tampa Electric has approximately 307,341 distribution poles.

COMMENTS

I. The Commission Can Add Predictability and Speed to Pole Access by Adopting Realistic Deadlines, Eliminating Ambiguity in the Existing Rules, and Adopting a Sensible “One-Touch” Rule for Communications Space Make-Ready.

A. The Commission Can Break Down The Most Significant Barrier To Wireline Deployment By Adopting A Sensible “One-Touch” Rule For Communications Space Make-Ready.

The most significant barrier to the installation of new aerial, wireline communications facilities is the disinterest and/or anti-competitive motive of existing communications attachers. The Commission is correct to focus on solving this part of the equation, whether through expedited communications make-ready timelines, expanded self-help remedies, one-touch make-ready, or some combination of the three. The majority of make-ready work involves solely the rearrangement of existing communications attachments. For example, data from Duke’s and AEP’s operating companies for the 2016-2017 time period indicate that the vast majority of “make-ready” poles require only communications space make-ready:

Make Ready In the Communication Space Only	
Operating Company	Percent
Appalachian Power (AEP)	75%
AEP Ohio	82%
AEP Texas	94%

Indiana Michigan Power (AEP)	96%
Kentucky Power (AEP)	83%
Public Service of Oklahoma (AEP)	83%
Southwestern Electric Power (AEP)	95%
Duke Energy Florida	80%
Duke Energy Ohio/Kentucky	82%
Duke Energy Carolinas	70%
Duke Energy Progress	68%
Duke Energy Indiana	73%
AVERAGE	82%

Even in those situations where make-ready above the communications space is required, the greatest delay in the process is the rearrangement of existing communications attachments. For example, between 2010 and 2016 in Tampa Electric Company's service territory, communications companies took an average of 278 days to complete communications space make-ready work, while engineering and construction of supply space make-ready took Tampa Electric Company an average of 55 days.

If the Commission can solve the delays in communications space make-ready, it will have removed the most significant deployment barrier. This is where the Commission should focus its efforts. **The Electric Utilities fully support the Commission's interest in expediting make-ready work within the communications space.**

The Electric Utilities believe, though, that mere revisions to the existing sequential timeline for communications space make-ready is not enough. The Commission needs to adopt a new approach that places less burden on existing attachers, less burden on the pole owner, and more control with the party seeking to make the new attachment, while at the same time protecting the existing attachers and pole owner from liability. To this end, the Commission should adopt a one-touch make-ready rule (similar in concept to those adopted by Nashville and Louisville) that incorporates the following principles:

- Upon approval of a permit by the pole owner (or upon completion of power supply space make-ready, if any), the new attacher performs all make-ready work in the communications space through the use of a qualified communications contractor.
- The new attacher must provide notice to the existing attachers and the pole owner upon completion of all make-ready work within the communications space and construction of new attachments within the communications space.
- Upon notice of completion, existing attachers and the pole owner may inspect such work at the new attacher's expense within a defined time period.
- If the work does not meet the requirements of the permit or applicable specifications, the new attacher will perform corrective work within a defined time period (with appropriate consequences and penalties for failure to timely perform the work).
- The new attacher may not perform any work above the communications space or on any facilities owned by an electric utility, wherever located.
- The new attacher provides appropriate protections (such as insurance, indemnities and surety bonds) to the pole owner and the existing attachers.²

The Commission asks, with respect to one-touch make-ready and other alternative pole attachment processes, “would Section 224 of the Act support such an approach.” (NPRM, ¶ 13). To be clear, the Electric Utilities have longstanding concerns regarding the Commission's expansive view of its authority under Section 224. But to be blunt, if the Commission had authority to adopt the communications space make-ready rules in the 2011 Order,³ then it has the authority to adopt a one-touch make-ready proposal here. The generic and unsubstantiated “concerns” raised by AT&T and Charter in their challenges to the Louisville and Nashville one-touch make-ready ordinances (*see* NPRM, ¶¶ 15 & 19) may indeed be legitimate, but given the importance of solving the delays associated with communications space make-ready, the relatively low risk associated with communications space make-ready, and the obvious bias incumbents have against

² The NPRM asks: (1) “[T]o ensure protections for existing attachers and utilities, would it be reasonable to impose on new attachers requirements such as surety bonds, indemnifications for outages and damages, and self-help remedies for utilities and existing attachers to fix problems caused by new attacher contractors?” and (2) “Should new attachers that perform make-ready work be required to indemnify, defend, and hold harmless existing attachers for damages or outages that occur as a result of make-ready work on their equipment?” (NPRM, ¶¶ 15, 19). The answer to both of these questions is “yes”—a rare point on which all stakeholders likely agree.

³ *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (the “2011 Order”).

any solution that expedites their competitors' access to networks, these "concerns" should not impede the Commission's progress on this issue. If the Commission is serious about taking big steps to expedite broadband deployment with minimal risk to grid safety and reliability, it will adopt some form of one-touch make-ready for the communications space. Any other solution merely snips around the edges.

The Commission also raises the example of CPS Energy's implementation of one-touch make-ready, and asks:

- Is it significant that this process is a utility-adopted approach as opposed to a government-adopted approach?
- What can the Commission do to encourage other utilities to adopt pole attachment policies like the one instituted by CPS Energy?

(NPRM, ¶ 24).

CPS Energy is a municipally-owned electric utility—an important fact that goes without mention in the NPRM. As a municipally-owned electric utility (i.e. a "government"), CPS Energy is excluded from Section 224, which means CPS Energy—unlike the Electric Utilities—has broad discretion to impose cutting-edge policies on all pole users, none of whom have recourse at the Commission. So the answer to the Commission's first question is that CPS Energy's one-touch make-ready program is "a government-adopted approach" (though it also happens to be a utility-adopted approach). The answer to the Commission's second question is a bit more complicated because utilities that are subject to the Commission's pole attachment jurisdiction cannot simply impose one-touch make-ready on all pole users. Unless the Commission is prepared to forbear from regulating utilities under Section 224, there is not much the Commission can do to encourage utilities to adopt one-touch make-ready policies. Even if the Commission would forbear from regulating utilities under Section 224, there would still be contractual restraints that prevented a private utility from simply starting with a clean slate with all pole users at the same time.

The only way one-touch make-ready can become a reality is through Commission rule and policy. And this makes sense, given that one-touch make-ready is essentially a policy decision that re-orders the interests of incumbent communications attachers and new market entrants—a subject on which the Electric Utilities have little interest and even less expertise. From the Electric Utilities’ perspective, there are indeed operational benefits to one-touch make-ready, chief among them that a single hand on the pole during a shorter time frame reduces the opportunity for miscommunication, violations and accidents. The public also benefits by reducing the number of occasions and the total amount of time during which the right-of-way is disturbed.

The need for Commission action with respect to one-touch make-ready is even more acute given the current efforts—in both the Commission and in various state legislatures—to restrain the power of the cities when it comes to right-of-way access policy. Put another way, the Electric Utilities cannot unilaterally implement a one-touch make-ready rule; and the Commission and various state legislatures are making it harder for individual cities to adopt such policies. If the Commission wants to see this happen, it must take action on its own. It is true that such action will not be well received by the ILECs and the incumbent cable providers. But this is not a reason to avoid a solution that solves the most significant part of the problem at no expense to the ILECs or incumbent cable providers. In fairness to all stakeholders, though, the adoption of a one-touch make-ready rule for the communications space should probably be pursuant to a further notice of proposed rulemaking with specific proposed rules for comment.

B. The Commission’s Rules Should Draw Clear Distinctions between Communications Space Make-Ready and Power Supply Space Make-Ready.

The Commission should draw clear distinctions between the rules applicable with respect to communications space make-ready vs. power supply space make-ready, as these are two entirely different issues both in terms of relevance to removing barriers and in terms of worker safety and

risk associated with such work. **There are no circumstances under which a one-touch make-ready or self-help remedy is appropriate above the communications space.** Though some of the Electric Utilities do, in fact, allow communications attachers to retain authorized contractors for purposes of power supply space make-ready (and even pole change-outs) under certain circumstances, this is a decision that should be left in the sound engineering, operational, labor relations, safety and reliability discretion of an individual electric utility. This principle should apply with equal force on poles owned by both electric utilities and ILECs.

The Commissions' proposed revision to Rule 1.1422(a) would require a utility to "separately identify" on its list of authorized contractors those contractors "it authorizes to perform make-ready above the communications space on its utility poles." Proposed Rule § 1.1422(a). There are several problems with this proposal. First, it is of no practical import because the Commission's rules (both existing and proposed) appropriately do not include a self-help remedy for make-ready above the communications space. *See* 2011 Order, ¶ 49 (limiting self-help remedy to communications space) and n.144 ("the contractor remedy does not apply to requests by wireless providers to attach outside the communications space on a pole"). Second, to the extent the Commission's proposed revision to Rule 1.1422(a) presupposes or foretells some sort of rule-based self-help remedy above the communications space, the Electric Utilities strongly oppose those revisions on engineering, operational, safety, and reliability grounds. Even though certain contractors are indeed capable of performing this important and dangerous work, this work must remain within the exclusive control of the Electric Utilities – whether performed by highly skilled internal or external resources.⁴ Third, the proposed revisions, as drafted, technically would allow

⁴ Many electric utilities are under state mandated reliability requirements. Work in the power supply space has a direct impact on reliability.

ILEC pole owners to determine which contractors are authorized to perform make-ready in the electric supply space. The Electric Utilities assume this is not what the Commission intended.

More broadly, other revisions to the Commission's rules are needed to more clearly address the distinctions between communications space make-ready and make-ready above the communications space. The existing rules specifically differentiate between where attachments are made (communications space vs. wireless attachments above the communications space), but not on the more important distinction between where the necessary make-ready is performed. Sometimes a request for attachment in the communications space requires make-ready in the electric supply space. And sometimes a request for wireless attachment above the communications space requires make-ready within the communications space.⁵ In either instance, as set forth above, the new attacher should be able to perform all make-ready work within the communications space but none of the make-ready above the communications space. The distinction in the Commission's existing rules between communications space attachments and wireless attachments above the communications space misses the point. The Electric Utilities care about where the make-ready is performed, not why the make-ready is performed. In this sense, the Electric Utilities are "platform neutral."

To this end, unless the Commission adopts a one-touch make-ready solution addressed in part I.A. above, the following changes to the Commission's existing Rule 1.1420(i) are warranted:

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space, may as specified in §1.1422, hire a contractor to complete a survey. If make-ready in the communications space is not complete ~~by the date specified in paragraph (e)(1)(ii) of this section~~ within 60 days of the date of the notice required by paragraph (e) of this section, a cable operator or telecommunications carrier ~~requesting attachment in the communications space~~

⁵ This is an infrequent scenario, for sure. Almost all wireless pole top attachments require a pole change-out in order to maintain ground clearance, separation requirements and achieve the additional pole top clearance necessary for pole top antenna attachments.

may hire a contractor to complete such communications space ~~the~~ make-ready. Under no circumstances shall a cable operator or telecommunications carrier hire a contractor to complete make-ready above the communications space without the express written consent of the electric utility.

With respect to make-ready work above the communications space, the remedy for failure to complete such work within a reasonable time period is, and should remain, filing a complaint with the Commission.⁶

C. The Commission Should Retain the Long-Standing 45-Day Application Response Deadline.

The Commission should not alter its long standing 45-day application response deadline set forth in Rule 1.1403(b) or (more recently) Rule 1.1420(c). This 45-day period has existed since shortly after the 1996 Act. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16101, ¶ 1224 (1996) (adopting current version of Rule 1.1403(b)). This 45-day period is the critical period during which a pole owner performs an engineering evaluation to determine whether a pole or pole line can accommodate a proposed attachment and, if not, what make-ready work, if any, can be performed to accommodate the proposed attachment. Though the precise order and type of work performed during this 45-day period varies from utility to utility, typical work includes:

- evaluation, organization and processing of paperwork
- scheduling a pole survey
- performing the pole survey
- evaluating the results of the pole survey
- performing a pole loading analysis based on data from the application and the survey
- review of the results from the pole loading analysis
- determining the power supply space and/or communications space make-ready work necessary to accommodate the proposed attachments
- review of the permitting contractor's work (if applicable)
- preparation and transmittal of written response to application

⁶ With the appropriate incentives to act, timeliness should never be a problem with respect to electric supply space make-ready.

Attached hereto as Exhibit 1 are process charts created by Duke, Oncor, and Tampa Electric illustrating the steps undertaken by the electric utility during the 45-day review period. It is questionable whether a utility could adequately perform all of these tasks for a single pole during the 15-day period proposed by the Commission, let alone for multiple poles (and especially for the volume of poles contemplated by Rule 1.1420(g)).

To put this in perspective, communications attachers routinely seek, in contract negotiations, between 45 and 60 days simply to pay an invoice – a process that merely involves cutting a check, and certainly not a process that involves multiple layers of engineering, field work and review (with safety and reliability consequences if done improperly). Along the same lines, communications attachers regularly seek multi-year or indefinite timeframes for tagging their existing attachments. Tagging requires only a single visit to the pole, with no paperwork and no engineering. In other words, asking a utility to process and evaluate a significant volume of permit applications within 45-days is already a Herculean task. Asking utilities to accomplish this task in one-third of the time frame that has existed within the Commission’s rules for more than 20 years is asking too much.

The only way a utility could possibly meet a 15-day deadline in the normal course is through one of two approaches: (1) cutting steps in the engineering review process; or (2) hiring significant additional “stand-by” resources. The first approach would undermine the safety and reliability of the network, to the detriment of all stakeholders. It simply isn’t a valid or responsible option. The second approach is viable, but the cost of these “stand-by” resources would need to be covered by the same communications attachers who regularly push back on the existing costs. Until there are guarantees that utilities can directly recover these costs on an allocated basis (depending on the number of poles permitted per year, per attacher), the utilities cannot risk

pushing these costs to electric ratepayers. If, however, the Commission is interested in adopting a safe-harbor rule that ensures utilities can directly recover the costs attendant to expedited application review, the Electric Utilities stand ready to discuss.⁷

The fact that expedited processing of applications would cost more should not come as a surprise. After all, expedited service in any context is usually more expensive because it requires the provider of the service to maintain or allocate resources with less-than-optimal efficiency. In fact, some of the Electric Utilities have negotiated expedited permit application processes with communications attachers and in every instance the cost is higher. This is true whether these costs are based on internal resources, external resources, or some combination of the two. And this is why the Commission's NPRM—which proposes to require utilities to act faster for even lower cost recovery—is something of a paradox.

The NPRM states, somewhat confusingly. “We seek comment on whether the review period for pole attachment applications should still include time for the utility to survey the poles for which access has been requested.” (NPRM, ¶ 10). If the Commission is contemplating a separate timeframe for the survey and other engineering work – with the 45 (or 15) day period being solely for the “paperwork” part of application processing – then this idea has potential. If, on the other hand, the Commission is contemplating an elimination of the survey, or transferring

⁷ For example, if the additional resources necessary to accommodate expedited review cost \$100,000 per year, then the \$100,000 would be allocated to attaching entities based on their volume of poles submitted for application that year. If the total number of poles for which applications were submitted in a given year was 10,000, and Company A submitted 5,000 of them, then Company A would bear \$50,000 of the cost of additional resources. This approach is probably palatable to attachers under the conditions described above, but it becomes problematic as the volume of applications decreases (while the additional cost of the “standby” resources remains fixed). If the volume of applications in an outlier year was only 250 poles, and 200 of them were submitted by Company A, then Company A would pay \$80,000 under the hypothetical described above. Though this admittedly seems unfair, it would be even more unfair to (a) require the electric ratepayers to bear these costs, or (b) require other attachers to bear these costs (either directly, or indirectly through the pole attachment rate). This example exposes the fundamental problem with the fixed costs associated with non-scalable resources.

this critical engineering component of the process solely to communications attachers, then this idea is a nonstarter for at least two reasons. First, the pole survey is only one component of the engineering review that goes into processing a permit application. As set forth above, there are multiple other components to the application process including the pole loading analysis, review of data collected from the survey, and determination of the make-ready work, if any, that can accommodate the proposed attachments. Removing a single (even though significant) component from the process would not warrant slashing the time period by 67%. Second, eliminating or shifting control of the survey solely to communications attachers would undermine the process in two ways: (a) it would lead to incomplete/incompatible data that would ultimately delay other aspects of the engineering process; and (b) it would lead to lower network reliability and threaten public safety—a problem for all stakeholders.

In short, the Commission should not revise the 45-day time period in Rules 1.1403(b) and 1.1420(c). Instead, the Commission should focus on other aspects of the process with the potential to yield larger gains in access efficiency without the concomitant risk to network reliability—most significantly, as set forth in part I.A. above, the manner in which communications space make-ready is performed.

D. The Commission Should Clarify that Rule 1.1420(d) Does Not Require Electric Utilities To Estimate the Cost of Rearranging or Transferring Existing Third-Party Attachments.

The NPRM seeks input on whether the estimate and acceptance periods in Rule 1.1420(d) could be shortened, combined or eliminated entirely. (NPRM, ¶ 10). The potential change from a 14-day estimate period to a 7-day estimate period is neither particularly important to the Electric Utilities, nor would it accomplish anything meaningful. This proposed rule change, like many others in the NPRM, merely snips around the edges rather than going to the heart of the matter.

There is, though, another important issue the Commission should clarify in Rule 1.1420(d) relating to the scope of the make-ready estimate. The current rule states, “a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work” 47 C.F.R. § 1.1420(d) (emphasis added). When read literally, the existing rule would seem to require a utility to provide an estimate not only for make-ready work on its own facilities, but also for make-ready work on third-party facilities. The Electric Utilities cannot estimate the make-ready costs of AT&T, Frontier, Charter, Cox, a city, the DOT or any other third-party attacher on its pole. Even if the Electric Utilities could estimate these costs, the third-party attachers probably wouldn’t honor them. The Electric Utilities can only estimate their own cost of power space make-ready, such as changing out open wire secondary for triplex, tightening a drip loop or repositioning a transformer.⁸ If the new attacher wants to know what it costs for AT&T and Charter to lower their facilities, the new attacher must ask AT&T and Charter.⁹ To this end, the Electric Utilities propose the following revisions to existing Rule 1.1420(d):

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform any ~~all~~ necessary make-ready work on such utility’s facilities within 14 days of providing the response required by §1.1420(c). . . .

Even though many attachers understand that an electric utility cannot provide an estimate for AT&T’s cost of rearrangement, some attachers (particularly new entrants, in the experience of Electric Utilities) still seem to read the rule literally.

⁸ Similarly, an ILEC pole owner would not be able to provide an estimate of the electric utility joint user’s make-ready cost.

⁹ This is all the more reason, as set forth below in section I.A., for the Commission to adopt a one-touch make-ready rule, which would eliminate the need to obtain estimates from existing communications attachers and the delay associated with performing such work.

E. The Commission Should Revise Rule 1.1420(g) In a Way That Creates Meaningful, Rather Than Illusory, Expectations and Predictability.

The Commission should definitely revise existing Rule 1.1420(g), but not as proposed in the NPRM. Particularly with respect to “pole attachment orders” (a phrase which falsely suggests this process is as simple as purchasing a widget from a warehouse) in excess of the lesser of 300 poles or 0.5% of the utility’s poles in a state, neither the existing rule nor the proposed revisions are even remotely tied to reality. In fact, the rule is so detached from reality as to render it utterly useless for purposes of creating legitimate expectations and predictability. The Commission should make two changes to Rule 1.1420(g): (1) it should limit its applicability to the application response and estimate; and (2) it should require good faith negotiation for the timing of all requests larger than the lesser of 300 poles or 0.5% of the utility’s poles in a state.

The aspect of this rule that is of most concern to the Electric Utilities is its interplay with the application response deadline in Rules 1.1403(b) and 1.1420(c). It is challenging enough to respond to applications for up to 300 poles within 45-days. The idea that electric utilities could perform all of the work necessary to respond to applications for ten times that number of poles (3000 poles) in a mere additional 15-days defies math and logic. *See* Rule 1.1420(g)(2) (allowing an additional 15 days under paragraph (c) for “orders up to the lesser of 3000 poles or 5 percent of the utility’s poles in a state”). The Commission’s additional proposal to require a response to applications for an unlimited number of poles—potentially every pole in a system—within 45-days is pure fantasy. *See* Proposed Rule 1.1420(g)(3) (allowing an additional 30 days beyond the 15 days proposed in paragraph (c) for “pole attachment orders larger than the lesser of (i) 3000 poles or (ii) 5 percent of the utility’s poles in a state”). Even if there were some way an electric utility could respond to such a volume of applications, it would be useless to the communications attacher because there is no way a communications attacher could perform construction (or that

the existing attachers could perform make-ready) at a commensurate pace. These problems are amplified if/when an electric utility receives large “pole attachment orders” from multiple communications attachers at the same time.

The solution to this problem is twofold:

- Eliminate existing Rule 1.1420(g)(2) in its entirety; and
- Restore the obligation for utilities to “negotiate in good faith” with respect to the timing of large “pole attachment order” but redefine large pole attachment orders as those in excess of the lesser of 300 poles or 0.5% of a utility’s poles in a state.

Further, the “application volume” rules should apply only to the application response and estimate deadlines. They should not apply to the actual make-ready work because:

- Communications space make-ready should be addressed through a one-touch rule as set forth in part I.A. above. In any event, allowing the utility pole owner to “add” time to the period for performing communications space make-ready does not make sense given that electric utilities almost never perform the communications space make-ready themselves.
- To the extent there is a deadline at all for make-ready work above the communications space, it should be addressed separately and clearly.

The revised Rule 1.1420(g) should read as follows:

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (de) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

~~(2) A utility may add 15 days to the survey period described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.~~

~~(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.~~

~~(4)~~ A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 0.5 percent of the utility's poles in a state.

~~(35)~~ A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

This would restore practicality to the rule, while at the same time restoring confidence to all stakeholders in the operability of the Commission's timelines.

The work that goes into responding to an application is not merely performing a survey. As set forth above, there are multiple tasks between submittal of a complete application and response to the application. A workable, meaningful response deadline, as proposed above, would allow electric utilities to properly engineer for new attachments while at the same time creating actual predictability and expectations (and thus lowering costs) for communications attachers. Achievability and predictability are particularly important as the rollout of 5G approaches. Good faith negotiation for high-volume application review yields the best results. For example, several of the Electric Utilities have, within the past three years, negotiated agreements with broadband providers that meet the providers' high-volume deployment schedule while at the same time ensuring cost recovery to the Electric Utilities.

F. If The Commission Does Not Adopt A “One-Touch” Rule For Communication Space Make-Ready, It Should Revise Rule 1.1420(e) To Streamline The Self-Help Remedy.

If the Commission adopts a one-touch make-ready rule for the communications space, it can and should get rid of other make-ready deadlines within Rule 1.1420(e). If the Commission does not adopt a one-touch make-ready rule, or if the Commission retains the existing Rule 1.1420(e) for any other reason, the Commission needs to make an important clarification in the “notification” protocol that has (1) led to misunderstandings regarding the parties' respective burdens in the communications space make-ready process, and (2) led to reluctance on the part of new attachers to use the self-help remedy granted in the 2011 Order. The existing version of Rule 1.1420(e) reads as follows:

(e) *Make-ready*. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

47 C.F.R. § 1.1420(e).

Though the Electric Utilities typically do provide an initial notice to existing attachers of the need for and nature of make-ready (often through NJUNS or another notification/communication platform), the initial notification does not include other minutia that

arguably are contemplated by the rule. The inartful language of the rule has, in essence, led to two distinct problems. First, communications attachers often insist electric utilities must coordinate make-ready in the communications space. This notion was specifically rejected in the 2011 Order, yet it persists today. *See* 2011 Order, ¶ 35 (“Several utilities contend that they should not be required to actively manage and coordinate make-ready. We agree.”). It is puzzling to the Electric Utilities why so many communications attachers cling to this notion. Why don’t they want control over notification and coordination? As the stakeholders with the greatest interest in seeing that the notice and coordination is done in a timely and persistent fashion, why would they possibly think this task is best delegated to the pole owner? The Commission should eliminate this problem by making it clear that, beyond an initial notification regarding the need for and nature of make-ready, the pole owner has no further notification or coordination obligations.

The second problem Rule 1.1420(e) has created is this: the awkward minutia arguably required in the initial notice has made some attachers reluctant to exercise their self-help remedy in the communications space. The self-help remedy within the communications space is one of the few rules adopted in the 2011 Order with the potential to actually promote broadband deployment. But on more than one occasion, when new attachers have complained to the Electric Utilities regarding the delay associated with the existing attachers’ rearrangement of their facilities, and the Electric Utilities have inquired as to whether the new attacher intended to exercise its self-help remedy, the new attacher has expressed reluctance because of the apparent “conditions precedent” in Rule 1.1420(e), all of which are presently outside the control of the new attacher. This needs to change.

If the Commission retains Rule 1.1420(e) at all, it should adopt a simplified version that eliminates subsections (1) and (2) and states:

(e) *Make-ready*. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify all entities with existing attachments that may be affected by the make-ready of the need for and nature of make-ready work. The prospective attacher thereafter shall be responsible for all further notifications to, and coordination with, such entities except as otherwise directed by the utility.

The revised version of the rule above would streamline the notification requirements and enhance the ability of new attachers to exercise their self-help remedy for communications space make-ready.

G. The Commission Can Encourage Innovative Deployment Solutions By Incentivizing, Rather Than Discouraging, Electric Utility Cooperation.

The Commission asks:

- “[A]re there ways that the Commission can eliminate or significantly reduce the need for make-ready work?”
- “[W]hat can the Commission do to encourage utilities to proactively make room for future attachers by consolidating existing attachments, reserving space on new poles for new attachers, and allowing the use of extension arms to increase pole capacity?”

(NPRM, ¶ 11).

The answer to the first question is “yes.” The answer to the second question is the key to facilitating the next generation of broadband deployment: the Commission can reverse course on its heavy-handed regulation of providers of pole space. As Chairman Pai recently noted, “the more heavily you regulate something, the less of it you’re likely to get.”¹⁰ So it is with the provision of pole space.

There is little incentive within the Commission’s existing rules for the Electric Utilities to pre-plan additional capacity, expedite their own make-ready work, or hire additional resources to streamline the application review process, and the Commission is proposing to strip incentives even further. Pole attachments are already a “loss” for the Electric Utilities, and the Commission

¹⁰ Remarks of FCC Chairman Ajit Pai at the Nuwseum, “The Future of Internet Freedom,” Washington, DC (April 26, 2017), available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-344590A1.pdf.

is going the wrong direction on mere propositions of basic cost recovery (reducing ILEC contribution to the network, lowering the telecom rate, capping make-ready costs, and otherwise imposing greater cost burdens on electric utilities and their ratepayers).

Moreover, the Commission is now proposing to guaranty the demise of the joint use relationship between electric utilities and ILECs. Ironically, these joint use relationships not only were the original basis for Commission jurisdiction over pole attachments on electric utility poles, but also were the reason that any pole could ever accommodate a new attachment without expansion of capacity. At a minimum, joint use agreements ensure the existence of the communications worker safety zone, which means a new attacher typically needs only one-foot of “available” space as opposed to nearly 4 ½ feet of space (12” for attachment + 40” for communications worker safety zone). Without joint use (or some other incentive), electric utilities will build pole networks of sufficient size and strength to accommodate only their own service needs. Any other approach would, from a regulatory ratemaking perspective, be imprudent.

If the Commission truly wants to facilitate deployment of the next generation of communications infrastructure, it will adopt policies that encourage, rather than discourage, collaboration, cooperation and innovation. But this would require a departure from the past 40 years of the Commission’s pole attachment regulation which has essentially been a forced-placed regulatory approach that has burdened, rather than incentivized, pole owners. This may have worked for wireline deployment in an era that benefitted from the structural advantages of jointly used infrastructure, but it will not work for large scale wireless deployment. Almost all attachment requests will require a pole change-out. Until amended by Congress, “a utility providing electric service may deny a cable television system or any telecommunications carrier access to its

poles...on a non-discriminatory basis where there is insufficient capacity. . . .” 47 U.S.C. § 224(f)(2).

II. The Commission Should Not Adopt A Presumption That ILECs Are “Similarly Situated” To Other Attachers, Unless The Presumption Applies Only To New ILEC Attachments.

The Commission’s proposed revisions to Rule 1.1424 would create a rebuttable presumption that ILECs are “similarly situated to” other attachers. This presumption would be at odds with the Commission’s own findings just six years ago, based on a significant record, that “incumbent LECs often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership.” (2011 Order, ¶ 203). The Commission’s proposed revisions to Rule 1.1424 not only would be at odds with its factual finding in the 2011 Order, but it would also fail to account for the critical distinction between existing attachments and new attachments.

The vast majority of ILEC networks have already been deployed through long-standing joint use agreements, some of which date back to the turn of the 20th century. In those joint use agreements, ILECs and electric utilities agreed to share their infrastructure for the distribution of their respective services, thus saving costs through a single, shared pole network in their overlapping services areas, rather than building separate, redundant networks. Under those agreements, ILECs deployed their networks with a plethora of operational advantages not enjoyed by their subsequent competitors, and without paying the make-ready costs their competitors were required to pay. In short, ILECs and their competitors came to the pole networks under decidedly different circumstances. And though the Commission can certainly rewrite its rules, it cannot rewrite history. Upsetting the existing burden of proof would be unjust, unreasonable, and anticompetitive because it would turbo-charge the ILEC advantage over its competitors, upend the

cost sharing agreements upon which joint use pole networks were constructed, and force even more costs onto electric ratepayers.

With respect to new ILEC attachments (or, more specifically, ILEC attachments to poles not previously in joint use), the Electric Utilities are willing to provide access to ILECs on rates, terms, and conditions comparable to other attachers. Some of the Electric Utilities have already offered pole license agreements to their ILEC joint use partners for new attachments, but those offers have been declined. The ILECs are not interested in competitive parity for purposes of deploying new facilities; they are only interested in a windfall for existing facilities.

A. The Electric Utilities Are Willing to Offer ILECs Reciprocal Pole License Agreements at the Telecom Rate for New Poles.

The Electric Utilities do not oppose a rule that creates a rebuttable presumption that ILEC attachments made pursuant to pole license agreements—thus lacking the advantages typically associated with historical joint use agreements—are subject to the telecom rate. On a going forward basis, if ILECs wish to make new attachments to poles not already in joint use, the Electric Utilities are willing to allow the ILECs to do so pursuant to the terms of reciprocal pole license agreements. Any such pole license agreements would apply only to poles not already in joint use because the parties already have the right to make new attachments to existing joint use poles at no additional cost (because adjustment payments are made on a per pole basis, rather than a per attachment basis), and because administration of simultaneous joint use and pole license agreements covering the same set of poles would be an administrative nightmare.

Under such agreements, ILECs and the Electric Utilities would be permitted to attach to each other's new poles as licensees on terms similar to those the Electric Utilities offer to other wireline licensees. This would mean, by way of example, that ILECs would be required to follow the Electric Utilities' permitting processes, would not be guaranteed the lowest space on the pole,

would pay annual rental on a per attachment (and not a per pole) basis, would be required to pay full make-ready costs, would be required to meet insurance, security, and indemnification requirements, and would not be afforded the historical deference afforded to ILECs as co-custodians of the joint use network. Under those circumstances, where ILECs are truly attaching on terms comparable to other wireline licensees, the Electric Utilities recognize the fairness of applying the same rate to their future attachments on new poles. Attachments on existing poles, constructed with the built-in advantages of existing joint use agreements, are a completely different story.

B. The Presumption Should be that Existing ILEC Attachments Are Governed by the Cost Sharing Arrangements Contained in Existing Joint Use Agreements.

1. ILECs Enjoy Numerous Advantages Under Joint Use Agreements That Are Not Available to Their Competitors.

With respect to existing ILEC attachments made pursuant to joint use agreements, the Commission's proposed presumption is contrary to the facts—as recognized in the 2011 Order—and thus unreasonable. As stated by the D.C. Circuit in *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 910 (D.C. Cir. 1999):

A factual presumption that causes a shift in the burden of production must be reasonable . . . as we explain below, **this means essentially that the circumstances giving rise to the presumption must make it more likely than not that the presumed fact exists.** . . . As we have said repeatedly, an evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact *so probable* that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.

(internal citations and quotations omitted) (bolded emphasis added); *see also Chem. Manufacturers Ass'n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997) (“an agency may only establish

a presumption if there is a sound and rational connection between the proved and inferred facts”), citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) (additional citations omitted).

Far from being “more likely than not,” it is highly unlikely that ILECs made their existing attachments on “comparable terms” to other attachers because the ILECs made them with the immense capital cost savings and operational advantages of joint use agreements. The FCC recognized this six years ago in the 2011 Order, stating:

- “Given that incumbent LECs often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership, we conclude that it would not be appropriate to treat them identically to telecommunications carrier or cable operator attachers in all circumstances.” (2011 Order, ¶ 203).
- “Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers... incumbent LECs also own many poles and historically have obtained access to other utilities’ poles within their incumbent LEC service territory through ‘joint use’ or other agreements. We therefore decline at this time to adopt comprehensive rules governing incumbent LECs’ pole attachments, finding it more appropriate to proceed on a case-by-case basis.” (2011 Order, ¶ 214).
- “. . . some commenters contend that joint use agreements give incumbent LECs advantages that offset any increased rates they might pay for pole access in certain circumstances. . . As examples of incumbent LEC advantages, these parties cite: **‘Paying significantly lower make-ready costs; No advance approval to make attachments; No post-attachment inspection costs; Rights-of-way often obtained by electric company; Guaranteed space on the pole; Preferential location on pole; No relocation and rearrangement costs; and Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.’** Comcast Reply at 25. Electric utilities also contend that existing joint use arrangements—in contrast to cable or telecommunications carrier pole lease agreements—reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today. . . **A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical**

- to those of telecommunications carriers or cable operators.** . . . As discussed below, incumbent LECs have the opportunity to demonstrate that they are comparably situated to telecommunications carriers or cable operators in a particular instance.” (2011 Order at 216, n. 654 (emphasis added)).
- “As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators.” (2011 Order , ¶ 217).

The benefits of joint use agreements identified by the Commission in its 2011 Order have not changed. As recently as last month, the Commission noted, “joint use agreements typically provide incumbent LECs a number of advantages not afforded to telecommunications carrier and cable attachers, such as guaranteed space on poles, lower make-ready costs, and the ability to attach without obtaining advance approval.” *In the Matter of Verizon Virginia, LLC v. Virginia Electric and Power Co. d/b/a Dominion Virginia Power*, Proceeding No. 15-190, Bureau ID No. EB-15-MD-006, Order, ¶ 4 (May 1, 2017) (citing 2011 Order, ¶ 216 n.654).

The advantages of joint use agreements are neither theoretical nor a relic of the past. In Atlanta, Georgia, between 2014 and 2016, major projects to deploy high speed broadband were initiated, one by a new entrant (Google Fiber) and one by a large ILEC (AT&T) with an existing joint use agreement.

- On February 19, 2014, the City of Atlanta announced it was working with Google Fiber on the possibility of bringing Google Fiber’s high-speed broadband to Atlanta.¹¹
- On April 21, 2014, AT&T announced a major initiative to expand ultra-fast fiber—AT&T U-verse with GigaPower service—to 100 candidate cities nationwide, including 21 new major metropolitan areas—one of which was Atlanta.¹²

¹¹ “City of Atlanta to Work with Google Fiber to Explore Bringing Residents Ultra-High Speed Internet Access,” *News Release, Mayor Kasim Reed, City of Atlanta, Mayor’s Office of Communications* (Feb. 19, 2014), available at <http://www.atlantaga.gov/index.aspx?page=672&recordid=2651>.

¹² “AT&T Eyes 100 U.S. Cities and Municipalities for its Ultra-Fast Fiber Network,” *AT&T Newsroom* (April 21, 2014), available at: http://about.att.com/story/att_eyes_100_u_s_cities_and_municipalities_for_its_ultra_fast_fiber_network.html.

- On October 14, 2014, AT&T confirmed it would expand its GigaPower network to the City of Atlanta, Sandy Springs, Decatur, and Newnan, Georgia.¹³
- On January 27, 2015, Google Fiber confirmed it would be building out a network in the Atlanta metro area.¹⁴
- In June of 2015, Google Fiber announced that it was beginning construction.¹⁵
- On September 29, 2015, less than 18 months after its initial announcement, AT&T announced that U-Verse with AT&T GigaPower was available in parts of Atlanta and its surrounding communities,¹⁶ and by February 2, 2016, had launched into additional Atlanta suburbs.¹⁷
- On August 15, 2016, nearly 2 ½ years after the initial announcement, Google Fiber went live in its first two neighborhoods in Atlanta.¹⁸

Further, the advantages of built-to-suit pole networks alone have saved ILECs hundreds of millions of dollars. For example, as explained by one of Duke Energy’s operating companies in response to a pole attachment complaint filed by Frontier:

- 5) Frontier and its predecessors, unlike CATV and CLEC attachers, did not pay make-ready prior to attaching their facilities to DEC’s poles. DEC’s system, because of the Joint Use Agreements, was built to suit joint use with Frontier. Because of the Joint Use Agreements, DEC constructed its pole infrastructure of sufficient height and strength to accommodate Frontier’s facilities. For example, the Joint Use Agreements identify a “40-foot, class 5 wood pole” as the “STANDARD JOINT USE POLE” for “support and clearance of electric supply and communications conductors.” If DEC had

¹³ “AT&T Confirms Plans to Deliver U-Verse with AT&T GigaPower to Atlanta Area,” *AT&T Newsroom* (October 14, 2014), available at: http://about.att.com/story/att_confirms_plans_to_deliver_u_verse_with_att_gigapower_to_atlanta_area.html.

¹⁴ “Google Fiber is Coming to Atlanta, Charlotte, Nashville and Raleigh-Durham,” *Google Fiber Official Blog* (January 27, 2015), available at: <https://fiber.googleblog.com/2015/01/google-fiber-is-coming-to-atlanta.html>.

¹⁵ “Building a Fiber Network,” *Decaturish.com* (June 2015), available at: <http://decaturish.wpengine.com/wp-content/uploads/2015/06/Atlanta-Start-of-Construction-One-Pager.pdf>

¹⁶ “Upgraded U-Verse with AT&T Gigapower Offers Launch in Atlanta Area,” *AT&T Newsroom* (Sept. 29, 2015), available at: http://about.att.com/story/uverse_with_att_gigapower_faster_speeds_atlanta.html.

¹⁷ “AT&T Launches Ultra-Fast Gigabit Internet Speeds in Buford, Jonesboro, Lawrenceville, Norcross, Roswell, Sugar Hill, and Suwanee,” *AT&T News Release* (Feb. 2, 2016), available at: http://about.att.com/content/dam/snrdocs/GigaPower/gigapower_buford_jonesboro_lawrenceville_norcross_roswell_sugar_hill_suwanee.pdf.

¹⁸ “Google Fiber is High-Speed, but Its Buildout Isn’t,” *Atlanta Business Chronicle* (Aug. 15, 2016), available at <http://www.bizjournals.com/atlanta/news/2016/08/15/google-fiber-is-high-speed-but-its-buildout-isn-t.html>.

constructed its network in the absence of the Joint Use Agreements, DEC would have built a network only to suit its own service needs; thus, the pole network would have been built with shorter poles and at less expense. Thus, had Frontier simply entered into license agreements (akin to DEC's pole license agreements with competitive local exchange carriers ("CLEC") and cable television providers ("CATV")), Frontier likely would have either (a) had to pay make-ready costs to replace each and every DEC pole to which it is attached, or (b) construct an entirely redundant network of poles.

- 6) In the absence of joint use, DEC would have constructed a network of poles only sufficient to accommodate DEC's service needs. There would have been no need for space allocated to the telephone company, and no need for the separation space required for poles with both electric and communication lines. This means Frontier would have needed to replace each of DEC's poles in order to gain access (assuming it was the first to access DEC's poles, which is a safe assumption given that it is the ILEC in the territories at issue in this case). Had Frontier and its predecessors paid engineering and make-ready costs to access DEC's pole network (as it would have existed without the Joint Use Agreements), it would have involved on average \$3,000 per pole, in today's dollars. This amount, which is a highly conservative figure, accounts for the engineering work, the cost of materials, the cost of labor, the cost to transfer DEC's facilities to the new poles, and other associated costs. This amount is also based on the costs for replacing an in-line (tangent) pole as opposed to a more complicated and costly junction or angle pole. Given that Frontier is currently attached to 59,357 DEC poles (covered by the three joint use agreements at issue in this case), Frontier has avoided more than \$178,000,000 in engineering and make-ready costs, by virtue of the Joint Use Agreements, as expressed in today's dollars.

(Decl. of Gilbert Scott Freeburn, Exh. 1 to Duke Energy Carolinas, LLC's Response to Pole Attachment Complaint, *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, Proceeding No. 14-214, File No. EB-14-MD-001, ¶¶ 5-6 (Feb. 25, 2014) (internal citations omitted). The \$178,000,000 in cost savings were only for one ILEC in one service territory of one Duke Energy operating company.

Another category of cost savings associated with joint use agreements is illustrated in the following chart comparing the estimated costs charged by Oncor Electric for an average new interspersed pole:

Pole Height & Class	ILEC	Licensee
40' class 5	\$0	\$1,715
40' class 3	\$136	\$1,889
50' class 3 single phase	\$716	\$2,251
50' class 3 three phase	\$716	\$2,413

The lower costs charged to ILECs for interset poles are directly related to those ILECs' contributions to network ownership costs.

2. ILECs Place A Greater Burden on Poles than Their Competitors.

Further, ILECs place a greater burden on poles than their competitors. ILECs occupy a greater number of feet of space on the pole. While CATV and CLEC attachers are presumed to occupy one foot of space under the Commission's telecom and cable rate formulas, the number of feet of space reserved for ILECs in the Electric Utilities major joint use agreements ranges from 2 to 3 feet for standard 40-foot poles. More space is reserved for ILECs in joint use agreements than is reserved for CLECs or CATVs in pole license agreements because ILECs actually occupy more space.

In addition to often having more than one attachment per pole, the ILECs' heavier, bundled lines, unlike a single fiber lashed to a steel messenger, have significant mid-span sag. As a result, an ILEC's attachment must be made higher on the pole to satisfy minimum grade clearance at mid-span, which in turn "occupies" a greater amount of space. For example, if minimum grade clearance is 18 feet, and mid-span sag is 3 feet, the attachment would need to be made at 21 feet on the pole. This results in "occupancy" of 4 feet for a single attachment (because no other communications attachment can be made either below the attachment or within the 12 inches above the attachment). This is particularly common in rural areas, where span lengths are greatest (resulting in more mid-span sag).

3. The Commission's About-Face with Respect to the Burden of Proof Is Not Reasonable.

The Commission adopted the current version of Rule 1.1424, which places the burden on ILECs to demonstrate that they are comparably situated to other attachers, just six years ago and after a 3 ½ year rulemaking proceeding. “[A]n agency may alter or reverse its position if the change is supported by a reasoned explanation.” *Enviro. Def. Fund v. Costle*, 657 F.2d 275, 289 (D.C. Cir. 1981); *see also Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) (“[I]t is axiomatic that agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent”) (internal citations and quotations omitted); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (stating “an agency changing its course must supply a reasoned analysis”). In contrast, “an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.” *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001).

The Commission’s stated justification for its proposed about-face shifting the burden of proof from ILECs to electric utilities is that the 2011 Order has “led to repeated disputes between incumbent LECs and utilities over appropriate pole attachment rates.” (NPRM, ¶ 44). The Commission also suggests that shifting the burden to electric companies will “end this controversy.” (NPRM, ¶ 45). However, the “repeated disputes” referenced in the NPRM actually amount to eight total complaints filed by two companies (Frontier and Verizon).¹⁹ All but two of

¹⁹ *Frontier Western Virginia, Inc. v. Appalachian Power Co.*, File No. EB-12-MD-04 (filed June 22, 2012); *Frontier Communications of the Carolinas LLC v. Duke Energy Progress, Inc.*, Docket No. 14-213, File No. EB-13-MD-007 (filed December 9, 2013); *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, Docket No. 14-214, File No. EB-14-MD-001 (filed January 17, 2014); *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, Docket No. 14-215; File No. EB-14-MD-002 (filed January 29, 2014); *Verizon Florida LLC v. Florida Light & Power Co.*, Docket No. 14-

those eight complaints have been resolved through settlement. By way of comparison, the Electric Utilities alone have more than 300 joint use agreements that were not the subject of any complaint proceedings following the 2011 Order.

The real reason for the “repeated disputes” was that a small number of ILECs refused to accept what the Commission said in the 2011 Order, including:

- “We therefore decline at this time to adopt comprehensive rules governing incumbent LECs’ pole attachments, finding it more appropriate to proceed on a case-by-case basis.” (2011 Order, ¶ 214).
- “...the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable.” (2011 Order, ¶ 216).
- “...we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power.” (2011 Order, ¶ 216)
- “...just and reasonable pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e).” (2011 Order, ¶ 217).
- “...if a **new** pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently. In particular, we find it reasonable to look to the preexisting, high-end telecom rate **as a reference point** in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher.” (2011 Order, ¶ 218) (emphasis added).

216, File No. EB-14-MD-003 (filed January 31, 2014); *Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company v. UGI Utilities, Inc.*, Docket No. 14-217, File No. EB-14-MD-007 (filed May 14, 2014); *Commonwealth telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company v. Metropolitan Edison Company*, Docket No. 14-218, File No. EB-14-MD-008 (filed June 11, 2014); and *Dominion Virginia Power v. Verizon*, Docket No. 15-190, File No. EB-15-MD-006 (filed August 3, 2015).

Rather than fairly considering these portions of the 2011 Order, some ILECs simply terminated their joint use agreements and quit paying their contractually required adjustment payments. When electric utilities sought recovery of the unpaid amounts, ILECs filed complaint proceedings and took the position that “there are only two possible just and reasonable rates for incumbent LEC pole attachments—the New and Old Telecom Rates,” and that the cost sharing formulas contained in their joint use agreements were irrelevant. *See, e.g. Verizon Florida LLC v. Florida Power and Light Co.*, Docket No. 14-216, File No. EB-14-MD-003, Memorandum Opinion and Order, ¶ 23 (Feb. 11, 2015) (characterizing the ILEC’s argument in that case). The Commission specifically rejected that position, stating, “the Commission specifically found in the *Pole Attachment Order* that ‘just and reasonable pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) and (e).’” *Id.* Some of those same ILECs also declined to accept offers by electric utilities to enter into pole license agreements at the telecom rate for new attachments, demonstrating that they were more interested in a windfall for existing attachments than actually deploying new networks. Importantly, the vast majority of joint use agreements did not end up in litigation at the Commission or anywhere else following the 2011 Order. Some ILECs seeking to avail themselves of the potential leverage created by the 2011 Order simply asked to renegotiate their cost sharing arrangements, which led to discussion and, ultimately, resolutions between the parties. Other joint use agreements remain completely undisturbed.

Moreover, adopting the proposed revisions to Rule 1.1424 will not “end this controversy.” It will reignite the controversy, by dislodging the stakeholders from a state of (apparent) equilibrium. If the Commission proceeds with adopting its proposed rule, ILECs will again demand that electric utilities apply the telecom rate to their existing attachments. Because most

ILEC attachments were made pursuant to joint use agreements containing the significant operational advantages discussed *supra*, electric utilities will decline to alter the rates in historical agreements with respect to existing attachments (and especially those rates negotiated after the 2011 Order). ILECs will take advantage, as they did following the 2011 Order, of an illegal “self-help” remedy by paying annual “rental” at the telecom rate. Electric utilities will then be forced to sue the ILECs in court to recover the rentals due under the contracts, and the ILECs will file complaints with the Commission. Numerous complaints will work their way through the Commission, but now the burden of proof will fall on the party seeking to uphold the express terms of the contract (the electric utility) rather than the party seeking to “get out” of the express terms of the contract (the ILEC). As a matter of logic and fairness, it should be the other way around.

Though the Electric Utilities still believe the Commission should never have adopted Rule 1.1424 in the first place, at least the current version of the rule appropriately places the burden on the party seeking to “get out” of the express terms of the contract. To make matters worse, the Commission indicates that an electric utility must show that “the benefits to the incumbent LEC far outstrip the benefits accorded to other pole attachers” and that the burden of proof is the “clear and convincing evidence” standard. (NPRM, ¶ 45) (emphasis added). The clear and convincing evidence standard is a higher burden of proof than the “preponderance of the evidence” standard that ordinarily governs civil litigation. *Parsi v. Daiouleslam*, 778 F.3d 116, 119 (D.C. Cir. 2015). Creating a presumption that does not reflect reality and that can only be rebutted by clear and convincing evidence is unjust and unreasonable.

1. The Commission Should Follow the Burden of Proof Articulated in *Florida Power & Light v. Verizon*.

The Commission seeks comment regarding:

What demonstration should be sufficient to show that an incumbent LEC attacher should not be entitled to the telecommunications rate formula? For instance should an incumbent LEC have to own a majority of poles in a joint ownership network? Should an incumbent LEC have to have special access to modify a utility's poles without prior notification?

(NPRM, ¶ 45). The Electric Utilities believe the Commission got it right in *Verizon Florida LLC v. Florida Power and Light Co.* There, the Commission found that the ILEC failed to meet its burden of proof to show that it was similarly situated to its competitors because:

Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time.

Verizon Florida LLC, Docket No. 14-216, Memo. Opinion and Order, ¶ 24 (Feb. 11, 2015). As it did in *Verizon Florida*, the Commission should continue to place the burden of proof on ILECs to quantify the value of the unique benefits they have received as a result of joint use agreements, and prove that the monetary value of those benefits is less than the difference between the agreement rates and telecom rate. This analysis will ensure that the ILEC only receives the telecom rate if it is truly similarly situated to its competitors (which will rarely, if ever, be the case with respect to existing facilities).

2. If the Commission Blue Pencils an ILEC's Adjustment Payments, it Must Require the ILEC to Make a Corresponding Reduction in the Electric Utility's Rate for Attachments to the ILEC's Poles.

The Commission further inquires:

How should the relative rates charged to the utility and the incumbent LEC factor into the analysis? If an incumbent LEC has attachments on utility poles pursuant to the terms of a joint use agreement, should the incumbent LEC entitlement to the telecommunications rate be conditioned on making commensurate reductions in the rates charged to the utility for attaching to the incumbent LEC's poles?

(NPRM, ¶ 45). Under any circumstances where the Commission blue pencils a joint use agreement to reduce an ILEC's rate, it should be conditioned upon a commensurate reduction in the rates the

ILEC charges the electric utility. Electric utilities are in a particularly vulnerable situation here because their facilities are not “pole attachments” within the meaning of Section 224(a)(4), and thus the Commission has no jurisdiction to regulate the rates, term and conditions of electric utility attachments on ILEC-owned poles.²⁰ In light of the fact that ILECs have already shifted the ownership burden (and accompanying costs) of pole networks to the electric utilities, it would add insult to injury to allow ILECs to continue charging electric utilities negotiated rates, while at the same time blue penciling the ILECs’ rates.

Further, if the Commission blue pencils ILEC rates in joint use agreements, it should also adopt a presumption that deprives ILECs of any benefits of joint use on a going-forward basis. Most joint use agreements contain provisions stating that the terms of the joint use agreement will continue to govern existing joint use poles even after termination of the joint use agreement. Without a specific mechanism for relief, electric utilities could be stuck with a lower rate and the continuing obligations of the joint use agreement.

3. Where an ILEC Cannot Prove It is Similarly Situated to Its Competitors, It Should Continue to Make the Adjustment Payments Negotiated under the Joint Use Agreement.

The Commission also “seek[s] comment on the rate that should apply to incumbent LECs in the event the utility pole owner can demonstrate the telecommunications rate should not apply.” (NPRM, ¶ 45). The Commission asks “In these instances, should the Commission use the pre-2011 telecommunications rate formula?” *Id.* If an ILEC attaches on terms and conditions similar to its competitors, then it is at least arguably reasonable that the ILEC should pay comparable rates to those competitors. But where the evidence shows that an ILEC is not similarly situated to its competitors or that it made attachments under different terms than its competitors, then there is no

²⁰ This puzzling lack of reciprocity makes it all the more likely that Congress never intended for ILECs to be viewed as “attachers” under Section 224.

reason to apply a regulated “rate.” Instead, the consideration in the parties’ joint use agreement should continue to apply.

C. Any Changes in Relative Pole Ownership Since 2011 Do Not Justify Application of the Telecom Rate to Existing Attachments.

The Commission inquires whether “relative levels of pole ownership between utilities, incumbent LECs, and other industry participants” have changed since the release of the 2011 Order. (NPRM, ¶ 46). The answer is “barely,” as demonstrated by the following exemplary data:

Operating Company	Number of Joint Use Poles as of 2016	Ownership Ratio in 2011	Ownership Ratio in 2016	Percentage Change
Duke Energy Carolinas	849,749	79.8% / 20.2%	81.7% / 18.3%	-1.9%
Entergy Mississippi	212,466	76.3% / 23.7%	76.6% / 23.4%	-0.3%
Entergy Texas	132,393	80.8% / 19.2%	80.9% / 19.1%	-0.01%
Alabama Power	885,731	77.2% / 22.8%	78.4% / 21.6%	-1.2%
Georgia Power	878,334	83% / 17%	83% / 17%	0%
Tampa Electric	124,502	91.4% / 8.6%	86% / 14%	5.4%

Furthermore, the Commission’s inquiry regarding current parity levels between ILECs and electric utilities is based on the false assumption that, to the extent ownership levels have changed, such a change counsels in favor of reducing ILEC “attachment rates.” *See* NPRM, ¶ 46. As an initial matter, most joint use agreements are based on the concept of “parity.” Parity describes the balance of ownership which, if satisfied, will result in no financial adjustment changing hands.²¹ Where the parties are in parity, no adjustment payments change hands. Thus, the “rate methodologies” in joint use agreements are simply proxies for the cost of joint use pole ownership. These joint use agreements are not “rental” agreements because any value provided by one party

²¹ These payments are often called “adjustment payments” because they adjust for the imbalance in ownership costs being carried by the parties when they are out of parity. Contractual parity depends on the particular agreement (whether 60%/40%, 55%/45%, or something else).

to the other offsets the additional cost of ownership (e.g., construction, maintenance, etc.) borne by the party owning poles in excess of contractual parity.

While some ILECs have maintained parity with their electric utility partners, others have not. But the notion that a decrease in ILEC pole ownership should mean the ILECs pay *less* toward the cost of the shared joint use network is exactly backwards. When the ILEC owns fewer joint use poles, it means the electric utility owns more joint use poles. Pole ownership costs money. As the electric utility's joint use pole ownership increases, so does its share of joint use pole ownership costs. Under these circumstances, the viability of the cost sharing arrangements upon which the joint use network was constructed become more—not less—economically relevant.

Viewing joint use adjustment payments as a proxy for pole ownership makes clear why a regulated rental rate formula is not an appropriate substitute for such payments. If an ILEC is in parity, then it would pay no annual adjustment payments to the electric utility. Under such a scenario, the ILEC could not complain to the Commission that it owns too many poles and that the Commission should require the electric utility to purchase some of them. But that is no different, economically speaking, than a regulator adjusting the rate methodology in joint use agreements.

Furthermore, it is factually inaccurate to view lack of parity as a corollary to lack of bargaining power. Take for example, a 1979 Joint Use Agreement between Duke Energy Carolinas (“DEC”) and Frontier. The earliest data indicates that as of 1978, DEC owned 96.92% of the parties’ joint use network, and Frontier’s predecessor owned 3.08%. As of 2012, Duke owned 99.41% of the parties’ joint use pole network and Frontier owned 0.59%. For billing year 2012, the reciprocal rate under the 1979 agreement was \$18.75 per pole. The result was that Frontier’s net joint use rental obligation for billing year 2012 was \$1,109,925. The annual cost of the joint use network was between \$4 million and \$5.2 million depending on how the annual cost

of a pole is calculated. At most, Frontier was carrying less than \$30,000 of this cost through actual ownership of joint use poles. Even with the offset produced by the 1979 Joint Use Agreement, DEC was still carrying between 72% and 78% of the cost of the joint use network, leaving only 22% to 28% to be carried by Frontier. Despite the fact that Duke owned almost all of the poles in the parties' joint use network, Duke Energy's joint use manager testified:

In my 10 years of experience at Progress Energy and Duke Energy Corp...The 1979 Joint Use Agreement is one of the most favorable agreements for the incumbent local exchange carrier ("ILEC") that I have ever seen. Not only does it provide the ILEC the benefits of joint use at a comparatively low joint use rental rate, but it also results in significant under-recovery of DEC's actual annual cost of the joint use network which, in the case of the 1979 Joint Use Agreement, is carried almost exclusively by DEC.

Declaration of Mr. Scott Freeburn, Exhibit 2 to Duke Energy Carolinas, LLC's Response to Pole Attachment Complaint, *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, Proceeding No. 14-215, File No. EB-14-MD-002, ¶ 5 (Feb. 28, 2014). Further, as stated by Duke Energy's expert in that case:

Frontier and Duke, through differing predecessors in interest, were also parties to at least three other joint use agreements, two executed in 1983 and one in 1985...In each of these geographic areas, Frontier owned a higher percentage of poles in the joint use network as compared to its ownership percentage in the area covered by the 1979 Agreement. Yet, this smaller ownership percentage did not result in a higher joint use rate. To the contrary, the rate in the territory with the lowest Frontier ownership percentage of joint use network poles was the lowest negotiated rate among the three previously discussed agreements for territories in North Carolina. This directly contradicts Frontier's argument that lower pole ownership percentages render the net licensee in an inferior bargaining position.

Id. at Exhibit 3, Declaration of Roger A. Spain, CPA, CFA, ABV, CVA, ¶¶ 10-11.

Applying the telecom rate to existing ILEC attachments deployed under joint use agreements would simply perpetuate the ILEC's historic advantage by granting ILECs a massive rate reduction for existing infrastructure to which the ILECs, unlike their competitors, gained access without the need for costly make-ready, and on a per-pole versus per-attachment basis. The

ILECs' significant pole ownership, their market position, and the corresponding potential for anticompetitive behavior by ILECs were among the reasons the Pole Attachments Act defined ILECs as "utilities" and not "attachers" in the first place.

III. The Variability of Make-Ready Costs Make Them Unsuitable for Representation In a "Schedule" and Utilities Already Invoice Such Costs On an Actual Cost Basis.

A. As the Commission Found in the 2011 Order, Make-Ready Costs Vary Based on Numerous Factors and Do Not Lend Themselves Well To a Set Schedule of Charges.

The Commission proposes adoption of new Rule 1.1416(d), which states:

If a utility performs make-ready, the utility shall make available to the cable television system operator or telecommunications carrier requesting attachment a schedule of its common make-ready charges that the new attacher may be charged.

The Commission considered and rejected nearly identical language in the 2011 Order:

We decline to require utilities to make available to attaching entities a schedule of common make-ready charges, and find that the burdens of such a requirement would exceed its benefits. In the *Further Notice*, the Commission suggested that such a schedule could provide transparency to providers seeking to deploy their networks. T-Mobile and TWC agree, but other commenters point out that make-ready is priced based on specific tasks at specific locations. **Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate. As such, the price of make-ready does not lend itself well to a fixed schedule of charges.** . . . Thus, we conclude, on balance, that the limited benefit of this proposal would not outweigh the burdens it would impose on utilities, and we decline to adopt it at this time.

(2011 Order, ¶ 86) (emphasis added).

Electric make-ready work involves any work that must be performed on the electric utility's facilities to prepare the pole for the new attachment. This could include a number of tasks, including but not limited to: moving electric facilities to a higher location on the pole (in the case of a requested communications space attachment) or lower on the pole (in the case of a requested pole top antennae attachment); tightening a drip loop; raising or lowering a street light; changing out certain conductors; or extending conduit. The exact power space make-ready work to be

performed on any particular pole is informed by the unique configuration of that particular pole, including the pole's height and class, the particular electric facilities on that pole, and the specific pre-existing third-party attachments on the pole.

The actual cost of make-ready work is determined by a number of factors, including but not limited to: the cost of contractor or internal labor; the cost of supplies and materials necessary to perform the work; the cost of rolling a truck to perform the work; overhead costs associated with the work; the number of tasks that must be performed on the pole, the complexity of those tasks, and the time it takes to complete them; costs associated with accessing the right-of-way, including traffic control costs in urban areas and municipal work permits; and costs associated with vegetation work. The cost of estimating a particular project's associated make-ready costs is also complicated by the fact that the ultimate cost of the power space make-ready associated with any particular project is affected by the scale of the project, and cannot be gleaned from an "a la carte" itemization of the estimated cost of separate per-pole make-ready tasks. For example, if the cost of sending a crew to a single pole to perform a specific task is \$500, this does not mean that the cost for the same task on the next nine poles in line is the same. The total job may cost less on a per pole basis (because the crew is already there) or it may cost more on a per pole basis (because some of the poles may be inaccessible by bucket truck and require climbing).

The Electric Utilities can appreciate the attachers' interest in understanding, as early as possible in the process, the potential cost of make-ready. However, as noted above, the cost of any particular power space make-ready is dependent on the unique characteristics of the pole at issue, the electric facilities, existing third-party attachments, and the scale of the overall project. Two seemingly identical make-ready jobs might have two different costs depending on the location of the pole at issue, and thus the amount of time required just for a crew to get to the job site. As

the Commission found in the 2011 Order, “the limited benefit of this proposal would not outweigh the burdens it would impose on utilities.” (2011 Order, ¶ 86).

B. The Electric Utilities Do Not Oppose a Rule Formalizing Their Existing Practice of Charging Actual Cost for Make-Ready Work.

The Commission proposes a new Rule 1.1416(b), which states: “The cable television system operator or telecommunications carrier requesting attachment shall be responsible only for the actual costs of make-ready made necessary solely as a result of its new attachments.” As a preliminary matter, **make-ready work is not a profit center for the Electric Utilities and it never has been.** Make-ready costs are calculated in the same manner as any other electric customer contribution in aid of construction. For this reason, the Electric Utilities do not oppose the concept embodied by proposed Rule 1.1416(b). However, the Electric Utilities have three concerns with the specific language in the proposed rule.

First, the Electric Utilities are concerned that the existing text of proposed Rule 1.1416(b) could preclude them from charging work order costs for make-ready work. For some of the Electric Utilities the work order amount is the actual cost of the make-ready work, and is the cost reflected on the electric utility’s books and other accounting records. In other words, there is no true-up after the work is completed. Instead, because the work order amount is the actual cost for the make-ready work reflected in the utility’s books, that is the amount the utility passes through to the requesting attacher, and the amount that is credited to the appropriate FERC accounts when the requesting attacher pays that invoice. The Electric Utilities that utilize this work order cost approach do so for administrative efficiency, and utilize this same approach for electric customer construction work as well.

Second, the Electric Utilities are concerned that proposed Rule 1.1416(b) could result in electric utilities footing the bill to replace electric facilities that would be “grandfathered” under

the NESC and other applicable standards but-for the requested attachment. Under the NESC, for example, installations that meet the applicable version of the NESC at the time of construction need not be brought into compliance with the current version of the NESC unless the existing pole is being replaced with a taller or stronger pole. *See* National Electrical Safety Code (NESC), IEEE Standards Association, Rule 013B (2017).²² Thus, where an attacher requests attachment to a pole with “grandfathered” electric facilities, the NESC may require that the electric utility upgrade those electric facilities to meet the current code. However, but for the new communications attachment, the electric utility might get years or even decades of additional use out of the

²² Rule 013B. Existing installations

1. Where an existing installation meets, or is altered to meet, these rules, such installation is considered to be in compliance with this edition and is not required to comply with any previous edition.
2. Existing installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules.
EXCEPTION 1: For safety reasons, the administrative authority may require compliance with these rules.
EXCEPTION 2: When a structure is replaced, the current requirements of Rule 238C shall be met, if applicable.
3. Where conductors or equipment are added, altered, or replaced on an existing structure, the structure or the facilities on the structure need not be modified or replaced if the resulting installation will be in compliance with either (a) the rules that were in effect at the time of the original installation, or (b) the rules in effect in a subsequent edition to which the installation has been previously brought into compliance, or (c) the rules of this edition in accordance with Rule 013B1. When an existing installation is brought into compliance with a subsequent edition, earlier editions no longer apply.
4. For structures that currently do not comply with Rule 013B3, if adding a new item, or replacing or rearranging existing items would not in itself, either (1) create a structural, clearance, or grounding non-conformance, or (2) worsen an existing non-conformance, then the addition, replacement, or alteration may be performed prior to correcting existing non-compliance items. For existing non-compliance items, see Rules 214A4 and A5.

See National Electrical Safety Code (NESC), IEEE Standards Association, Rule 013B (2017).

“grandfathered” facilities before upgrade was necessary. As costs that are caused by the new attacher, these are costs that should be paid by the new attacher.²³

Third, the Electric Utilities are concerned that the use of the phrase “solely” in proposed Rule 1.1416(b) could be interpreted to preclude the voluntary assumption of “make-right” costs. The term “make-right” is sometimes used to describe the work necessary to remedy any existing violations before the requesting attacher can make its attachment. It can be difficult to tell which party’s existing attachment on the pole caused the violation, and existing attachers often dispute who caused the violation. In such circumstances, the requesting attacher has two options: (1) it can voluntarily assume the cost of correcting those existing violations—thus expediting its attachment—and later seek reimbursement from whichever parties it believes to be responsible for those violations; or (2) it can wait while the existing parties to the pole work out their dispute and take the necessary corrective action. The Electric Utilities are sympathetic to the notion that a new attacher should not be required to bear the cost of correcting existing third-party violations, which is why attachers have the option of either fronting the cost of the necessary corrective action or

²³ The Commission has previously deferred on this issue. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-9814, FCC Rcd 18049, 18082-83, 18085 (Oct. 26, 1999) (emphasis added):

96. ...According to EEI and UTC, the “grandfathering” provisions of the NESC allow utilities to delay modifications to meet code changes until “more than a minimal amount of other work is done.” EEI and UTC contend that it would be unfair for utilities to bear the cost of a safety compliance upgrade if the upgrade is triggered solely because of modifications arising from utilities’ obligations to allow attachments.

...

105. ...[O]ur rule would require a utility that alters its facilities in accordance with the NESC at the time of a modification to share in the costs of the modification. EEI, UTC, and Duquesne seek clarification of this requirement in the context of changes to the NESC since the facilities were built. A utility must alter its facilities in response to changes to the NESC at the time the NESC so requires. This is a matter that we expect to be well-established under current practices, **and is in any case beyond the scope of this proceeding.**

simply waiting until the existing violations are resolved. But the solution often urged by attachers—that the pole owner front these costs and seek reimbursement from the existing attachers—makes even less sense because it puts all of the financial risk on the pole owner, who neither caused the violations nor stands to gain from the corrective action (unless the violation presents an imminent threat to safety and reliability).

In order to address these concerns, the Electric Utilities propose the following revisions to proposed Rule 1.1416(b):

(b) The cable television system operator or telecommunications carrier requesting attachment shall be responsible only for the actual cost of make-ready made necessary ~~solely~~ as a result of its new attachments. Such costs shall be computed in the same manner as work orders prepared in the ordinary course for the utility's core service to its customers. For purposes of this section, replacement of "grandfathered" facilities shall be deemed to have been made necessary as a result of the new attachment.

C. Any "Alternative" to Payment of Actual Costs for Make-Ready Would Result in Underpayment or Overpayment.

The Commission requests comment on whether it would be reasonable to allow utilities to set a standard charge per pole that a new attacher may choose in lieu of a "cost-allocated charge," and asks "Should the choice belong to the utility or the new attacher?" (NPRM, ¶ 36). The problem with such an approach is that the cost of power space make-ready on any particular pole could range from \$250 to \$25,000. The only way the Electric Utilities could set a flat fee that ensured the electric ratepayers would not bear costs properly attributable to the attacher would be to set the flat fee at the high end of the range. On the other hand, if the requesting attacher is given the choice of whether to pay the actual cost of make-ready or a flat fee that is less than actual cost, the attacher will always choose the flat fee, which would result in the electric ratepayers subsidizing the attacher's make-ready.

The Commission also asks whether a flat fee approach would “provide new attachers with an affordable alternative to negotiating with the utility over the applicable costs to be included in make-ready charges.” (NPRM, ¶ 36). However, as set forth above, make-ready charges are based on actual costs and vary from pole to pole depending on the specific equipment on, and characteristics of, any particular pole. Make-ready charges are not negotiable because there is nothing to negotiate in an actual cost transaction.

The NPRM also seeks comment on “whether it would be reasonable to require utilities to reimburse new attachers for make-ready costs for improvements that subsequently benefit the utility.” (NPRM, ¶ 36). Not only would this be an administrative nightmare, but it also overlooks that the utility likely has no present business need for any alleged betterment. The record keeping and costs of administering such reimbursements, along with the disputes that would inevitably arise, would outweigh any supposed benefit of the additional space created for utilities. Many of the “benefits” that the Commission identifies as potentially resulting for electric utilities from make-ready work paid for by attachers—“e.g., the modification allows utilities to use additional space on a pole for its own uses or creates a vehicle for the utility to receive additional revenues from subsequent attachers”—would not occur until months, years, or decades after the incremental attacher pays for the make-ready work. (*See* NPRM, ¶ 36). Depending on what other work is done on the pole between the time that the make-ready work at issue is performed and a new attachment is made by the utility or another attacher, it may be wholly unclear which parties’ work actually created the additional space utilized. Make-ready work that creates additional (unused) space on the pole would not constitute a “benefit” because it would simply be unused space.

Further, make-ready work rarely creates additional power space for subsequent use by the electric utility because the added space on the pole is typically beneath the power supply space.

In a typical pole change-out, the electric distribution facilities will be transferred to the new pole in the same relative position. Additional space that is later utilized by a third party that then pays rental to the electric utility does not result in a “benefit” to the electric utility. But for the first attacher, the subsequent attacher would simply have paid for such make-ready itself and began paying annual rental to the utility once attached. In either event, the electric utility is in the same position. The party that actually benefits from make-ready work performed by one attacher is the subsequent attacher who might avoid make-ready costs. To the extent the Commission wishes to grant the attacher paying for make-ready the right to charge a percentage of that make-ready cost to the subsequent attacher, the Electric Utilities assert that the Commission should not involve the Electric Utilities in that process.

IV. The Commission’s Treatment of Capital Expenses Should Encourage, Rather than Discourage, the Facilitation of Broadband Deployment.

A. The Proposed Revisions to Rule 1.1409(c) Reflect Existing Practice, But the Commission’s Other Inquires In Connection With the Proposed Revision Are Troubling.

The Electric Utilities do not oppose the Commission’s proposed addition to Rule 1.1409(c), as drafted. This revision reflects the longstanding practice of treating make-ready reimbursements – and all customer contributions in aid of construction for that matter – as rate base neutral. In other words, if it costs an electric utility \$2,500 to change out a pole and transfer its electric facilities to the new pole, and a communications attacher reimburses the electric utility \$2,500, the \$2,500 is credited to the same capital and expense accounts to which the work was originally charged. This results in neither an inflating nor deflating effect on the rates yielded by the Commission’s formulas. The NPRM suggests, though, that make-ready reimbursement for a pole change-out should yield lower rates for both the new attacher and the existing attachers. (NPRM,

¶ 38). There are at least two problems with this suggestion, one of which relates to the principles of mass property accounting and another that relates to the accounting for particular asset at issue.

The first main problem is that the Commission's rate formulas rely on FERC Account-level data, which is based on mass property accounting. The Commission's rate formulas for wireline attachments have never applied on a pole-by-pole basis but instead rely either upon system averages or some identifiable subset of the system. In other words, if we assume a network of 10 poles, 9 of which have an annual cost of \$100/pole and one of which has an annual cost of \$0, and if we further assume an entity pays 10% of the annual cost per pole to use all 10 poles, then there is no difference between paying \$9/pole for all 10 poles vs. \$10/pole for 9 poles (but \$0 for the 10th pole). Even the Commission's revisions to the telecom rate in 2011 and 2015, awkward as they were, still adhered to ratemaking premised upon the principles of mass property accounting. If the Electric Utilities are charged with calculating different rates for each pole that hosts a communications attachment, then the overall pole attachment rentals would increase for at least two reasons: (1) the subset of distribution assets that host communications attachments is more expensive (due to size and strength) than the average pole in the system; and (2) the administrative cost of calculating rates would increase exponentially.

The second main problem with the Commission's suggestion is that it fails to account for the asset removed from service solely because of the needs of the new attacher. This pre-existing asset was funded by electric ratepayers and appropriately remains part of the rate base—for pole attachment ratemaking and all other ratemaking purposes. Make-ready reimbursements do not “wipe away” costs the electric utility has already incurred; they simply offset the additional costs incurred solely on behalf of the new attachment. For this reason, even under an impractical pole-by-pole approach, existing attachers should not expect any decrease in their rate because the rate

they are paying would be based on the pre-existing asset that was in service and remains on the electric utility's books. The same is true for the new attacher. Though the make-ready reimbursement covers the incremental capital and operating expenses caused by the new attachment, this contributes nothing to the embedded cost of the asset that was removed from service solely because of the new attachment.

B. When an Electric Utility Replaces a Pole For Purposes of Its Core Business, It Is Not “Make-Ready”—It Is The Provision of Electric Service.

The NPRM also “seek[s] comment on how utilities treat capital expenses associated with their own make-ready work” and asks, “[w]hen utilities replace poles to accommodate their own needs or to create additional electrical space, do they appropriately treat associated capital expenses as make-ready work that is wholly excluded from pole attachment rates?” (NPRM, ¶ 38). Though the Electric Utilities cannot comment on how the ILECs account for different types of costs, the Electric Utilities do not consider pole replacements in their normal course of core business as “make-ready,” nor are such costs excluded from FERC Account 364 (or any other account). In fact, these costs are the very basis of FERC Account 364.

The Electric Utilities take particular exception to the tendentious inquiry into whether utilities “appropriately treat associated capital expenses as make-ready work that is wholly excluded from pole attachment rates.” (NPRM, ¶ 38). If the costs of installing new poles for purposes of serving electric customers were not booked to FERC Account 364, what costs would be booked to FERC Account 364? One of three things is happening: (1) the Electric Utilities are misunderstanding the Commission's inquiry; (2) the Commission is misunderstanding FERC accounting; or (3) the Commission is suggesting that electric utilities should keep a “shadow” set of books exclusively for pole attachment ratemaking. If it is (1) or (2), the misunderstanding can be easily cleared-up. If it is (3), then the Commission needs to initiate a new, full-scale ratemaking

proceeding to reconsider its 40-year reliance on FERC Accounts (i.e. publicly available accounting data subject to state and federal regulatory scrutiny).²⁴

C. The Commission Should Restore the Meaning of “Cost” As Used In the Telecom Rate to Its Originally Understood and Universally Accepted Meaning.

The Commission asks “whether we should exclude capital costs that are not otherwise recoverable through make-ready fees from the upper-bound cable and telecommunications pole attachment rates.” (NPRM, ¶ 40). The answer to this question is “no.” In fact, the Commission should go in the complete opposite direction and undo the damage to the long-understood meaning of “cost” in Section 224(e) occasioned by the 2011 Order and the 2015 Telecom Rate Order.²⁵ At a time when the need for pole change-outs (i.e. capacity expansion) is on the verge of explosion, the Commission should be taking steps to encourage and incentivize, rather than discourage and deter, cooperation and efficiency in pole change-outs. *See* 47 U.S.C. §224(f)(2) (allowing electric utilities to deny access on a non-discriminatory basis for reasons of insufficient capacity).

The NPRM further inquires: “To what extent would the exclusion of such capital costs further reduce pole attachment rates?” (NPRM, ¶ 40). As shown in the chart below, the capital

²⁴ In its earliest notice of proposed rulemaking to implement the original Pole Attachments Act, the Commission noted:

Nevertheless, the [Senate] Report concluded that special accounting measures or studies should not be necessary. This conclusion rests in some degree on the belief that the majority of cost and expense items attributable to utility pole plant are known and reflected in publicly available accounts filed by the utilities with regulatory authorities. Nor does Congress seem to want the Commission to look behind these accounts.

In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 FCC 2d. 3, ¶ 15 (1978).

²⁵ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (the “2015 Telecom Rate Order”).

cost components of the annual carrying charge rate account for between 57% and 79% of the total carrying charge rate.²⁶

Operating Company	Total Carrying Charge Rate	Depreciation Element	Taxes Element	Rate of Return Element	Total of “Capital” Elements	Capital Elements as % of Total
Alabama Power	22.27%	3.79%	5.65%	6.43%	15.87%	71%
Gulf Power	28.26%	7.54%	6.68%	6.39%	20.61%	73%
Mississippi Power	35.74%	7.67%	6.64%	9.30%	23.61%	66%
Georgia Power	28.39%	4.81%	7.37%	7.53%	19.71%	69%
Duke Energy Carolinas	30.83%	5.34%	5.64%	7.88%	18.80%	61%
Duke Energy Progress	39.92%	14.42%	3.82%	7.49%	25.73%	64%
Duke Energy Florida	31.24%	10.52%	5.41%	6.65%	22.58%	72%
Duke Energy Indiana	30.29%	7.12%	4.22%	7.30%	18.64%	62%
Appalachian Power (WV)	34.27%	7.51%	5.05%	7.38%	19.94%	58%
Appalachian Power (Virginia)	33.77%	7.51%	5.05%	6.88%	19.44%	58%
Wheeling Power	32.47%	6.75%	4.29%	7.38%	18.42%	57%
Indiana Michigan Power	27.54%	5.44%	4.68%	6.97%	17.09%	62%
Public Service Co. of Oklahoma	26.61%	5.11%	3.87%	6.94%	15.92%	60%
Southwestern Electric Power	26.08%	5.06%	3.10%	7.77%	15.93%	61%
Texas Central	26.43%	7.25%	6.06%	7.50%	20.81%	79%
Texas North	23.30%	6.94%	3.66%	7.46%	18.06%	78%
Entergy Texas	31.03%	7.18%	6.37%	8.22%	21.77%	70%
Entergy Mississippi	33.61%	7.96%	8.28%	7.96%	24.20%	72%
Ameren Missouri	38.10%	11.85%	7.35%	7.83%	27.03%	71%
Oncor Electric	27.25%	3.94%	7.34%	8.14%	19.42%	71%
Tampa Electric	30.67%	10.39%	4.62%	6.31%	21.32%	70%

This means the Electric Utilities stand to lose, on average, 70% of their pole cost recovery from cable television system and telecommunication carrier attachments if capital costs are

²⁶ The chart provides data for each operating company of the Electric Utilities in those state where pole attachments are regulated by the Commission. The data is based on each operating company’s most recent calculations of pole attachment rates, using the Commission’s carrying charge rate formula. Appalachian Power, Wheeling Power, Indiana Michigan Power, Public Service Company of Oklahoma, Texas Central, Texas North, and Southwest Electric Power are operating companies or divisions of AEP.

excluded from the pole attachment rate. To put this in perspective, if we assume an annual pole cost of \$100/pole and a rate formula that yields 7.41% of the annual pole cost, the exclusion of capital expenses from the rate would convert a \$7.41 rate into a rate of \$2.23. This would move cost recovery from bad to worse. In the aggregate for the Electric Utilities, this would shift approximately \$30 million in costs annually to electric ratepayers. This does not even account for the potential carryover effect into the states that regulate pole attachments, nor does it account for the continuing downward pressure on the ILECs' contributions to the cost of the shared network.

The Commission asks: "What policy justifies charging pole attachers, whose costs of deployment may determine the scope of their investment in infrastructure, anything more than the incremental cost of attachment to utilities?" (NPRM, ¶ 40). The answer is this: the same policy that leads the Commission to explore means of promoting broadband deployment. Because if the Commission removes all incentive for the Electric Utilities to be willing (let alone eager) participants in the broadband deployment solution, then the Commission will have created even greater barriers to deployment. The Electric Utilities cannot be regulated into enthusiasm. As Chairman Pai correctly noted, "the more heavily you regulate something, the less of it you're likely to get."²⁷

As load growth (and thus revenue) slows, the Electric Utilities are actively seeking opportunities to offset rate base for the benefit of electric ratepayers. Partnering with communications attachers on innovative solutions for deploying the next generation of advanced communications infrastructure is a natural fit, but it makes no sense for the Electric Utilities if they are only allowed to recover their incremental costs with absolutely no benefit to the electric

²⁷ Remarks of FCC Chairman Ajit Pai at the Nuwseum, "The Future of Internet Freedom," Washington, DC (April 26, 2017), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-344590A1.pdf.

ratepayers (to say nothing of the shareholders). The Commission can either slow broadband deployment through heavy-handed regulation of the providers of pole space, or it can adopt a regulatory approach that incentivizes collaboration, cooperation and innovation. A one-sided regulatory approach that benefits only one set of stakeholders does not incentivize collaboration, cooperation and innovation.

Moreover, the notion that recurring pole attachment fees—which are an O&M expense, not a capital expense, to communications attachers—are a meaningful factor in deployment decisions has been repeatedly debunked.²⁸ The entities that are actually deploying networks are far less concerned (if at all) with recurring pole attachment rental fees than they are with the upfront capital expense, time and logistics associated with deployment. Just ask them. The recurring pole attachment rental fees are, on the other hand, an important offset to the electric rate base.

Though the Commission is correct to address those issues that impact the capital expense of broadband deployment (like expediting make-ready processes and improving transparency in make-ready costs) it should go in the opposite direction with pole attachment rates and provide the incentive to pole owners to help make this work. The Commission asks:

The Commission has previously interpreted the term “cost” in the [telecom rate] formula to exclude at least some capital costs. Should we revisit this interpretation and interpret the term “cost” in the telecommunications pole attachment formula to exclude all capital costs?

²⁸ For example, in comments responding to the Commission’s 2015 Request to Refresh the Record in WC Docket No. 07-245, the Electric Utilities provided data showing that recurring pole attachment fees were less than 1% of a broadband provider’s operating expenses. Comments by Ameren Corp., American Electric Power Service Corp., Duke Energy Corp., Oncor Electric Deliver Company LLC, Southern Company, and Tampa Electric Company in Opposition to Petition to Reconsider the Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments, *Parties Asked to Refresh the Record Regarding Petition to Reconsider Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments*, WC Docket No. 07-245 (June 4, 2015). No party rebutted this data, and the Commission appeared to accept this data in its 2015 Telecom Rate Order but nonetheless said, “we cannot afford to dismiss the importance of even potentially small increments.” (2015 Telecom Rate Order, ¶ 27). Small increments merely snip around the edges. The Commission should aim for the heart of the problem—delays/costs caused by existing communications attachers—while at the same time restoring an incentive to act for those who own and control the infrastructure.

(NPRM, ¶ 41).

The Commission should revisit its interpretation of the term “cost” in the telecom rate formula, but it should restore the meaning of “cost” as understood by the Commission for the first fifteen years of the telecom rate’s existence. The Commission’s understanding of this term was not based upon an interpretation of an allegedly ambiguous term, but instead based on the Commission’s contemporaneous understanding of what Congress had required in the 1996 Act. In its earliest order implementing the 1996 Act, the Commission stated:

The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used...to provide any telecommunications service. The Act prescribed a new methodology for determining pole attachment rates for the latter group. **The new formulas will require that, in addition to paying their share of a pole’s usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole, duct, conduit, or right-of-way.** In order to implement these new formulas, Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.

In re Implementation of Section 703 of the Telecommunications Act of 1996, 11 FCC Rcd. 9541, ¶ 6 (Aug. 6, 1996) (emphasis added). The reference to “formulas” in the bold sentence above is unmistakably a reference to the statute itself. Otherwise, the last sentence of the block quote above would be meaningless.

This understanding spanned three different administrations (Presidents Clinton, G. W. Bush and Obama). There may indeed be elements of the telecom rate formula worthy of reevaluation. Perhaps it is time to reexamine certain presumptions within the formula, such as the pole height, the amount of usable and unusable space on a pole, and the number of attaching

entities per pole.²⁹ Each of these presumptions, depending on whether and how they are adjusted, could have a deflating effect on the rate yielded by the telecom rate formula. But the “cost” allocated through any of the Commission’s pole attachment rate formulas should be a constant, rather than a results-oriented variable. This would also avoid what the Commission characterizes as “the awkward interpretation contained in our present rules that defines the term ‘cost’ in two separate different ways at the same time.” (NPRM, ¶ 41). Although, to be fair, the Commission’s current rules actually define the term “cost” in an infinite number of “different ways at the same time.” The cable rate formula defines it one way (the way “cost” was defined throughout Section 224 for 33 years) and the telecom rate formula currently defines it as many ways necessary to achieve the mathematical result intended by the 2015 Telecom Rate Order. “Awkward” is an understatement.

The Electric Utilities have long agreed with the Commission’s goal of establishing rate parity between cable television and telecommunications carrier attachments. In fact, the Electric Utilities believe that was Congress’ expectation as the cable television systems of yesteryear began offering advanced services (as they now all offer). 142 Cong. Rec. S689 (Feb. 1, 1996) (“Telecommunications Bill Resolved Issues”) (“Cable companies may continue to pay the same rate as long as they provide only cable service; once cable companies start to provide telephone service, a higher rate will phase in over ten years.”). The problem with rate disparity was a problem of the Commission’s making because even as cable television systems began to offer the advanced services anticipated by Congress, the Commission refused to apply the higher telecom pole

²⁹ This is especially important if the Commission intends to apply the telecom rate formula to ILEC attachments. The current space occupancy presumptions (developed during the lengthy period of regulatory history when ILECs were considered “utilities” rather than “attachers” under Section 224) do not account for—and never even considered—the space allocations in joint use agreement or the amount of space physically occupied by ILEC attachments based on their size/weight or position on the pole.

attachment rate. This approach led to a very small class of attachments to which the higher telecom pole attachment rate applied, and altered the institutional expectations of cable television systems in a way that put the Commission in a bit of a jam when it decided – for purposes unrelated to pole attachments – to classify broadband internet access service as a “telecommunications service.” This awkward posture led to an even more awkward result in the Commission’s 2015 Telecom Rate Order. The Commission can, and should, undo this awkwardness and restore the definition of “cost” used throughout Section 224 for its first 33 years.

D. The Electric Utilities Support the Adoption of a Single Rate Formula Applicable to All Cable Television Systems and Telecommunications Carriers.

The Commission also seeks comment on “the appropriate rate for commingled services.” (NPRM, ¶ 42). As a preliminary matter, the Commission is only bound to the Section 224(d) and (e) formulas with respect to pole attachments “used by a cable television system solely to provide cable service” and pole attachments “used by telecommunications carriers to provide telecommunications services,” respectively. 47 U.S.C. § 224(d)(3)&(e)(1). Under Section 224(b), the Commission has discretion with respect to “other” attachments by a cable television system. *Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327, 335 (2002) (finding that “nothing about the text of § 224(d) and (e), and nothing about the structure of the Act, suggests that these are the exclusive rates allowed”). Currently, virtually all cable television system attachments are used to provide telecommunications services (including but not limited to broadband internet access service) and these attachments are subject to the telecom pole attachment rate. But if the Commission reverses its classification of broadband internet access

service as part of any roll-back of the net neutrality rules, then two things will happen relevant to pole attachments:

- The proper rate classification for cable television attachments will return to the state of ambiguity that existed prior to the classification of broadband internet access service as a “telecommunications service”; and
- Many attaching entities—such as entities, like Google Fiber, focused on deployment of high-speed fiber networks—will fall out of Section 224 protection altogether (because they will no longer be offering a “telecommunications service”).

The Commission can solve these issues by either: (1) retaining the classification of broadband internet access service as a “telecommunications service” for purposes of Section 224, even while rolling-back net neutrality rules and/or forbearing from applying other Title II burdens on broadband internet access service providers; or (2) using its Section 224(b) discretion to apply the telecom rate formula to commingled attachments. The Commission could then open a rulemaking proceeding specifically dedicated to rebuilding the telecom pole attachment rate from the ground up, with a goal of landing at cost recovery somewhere between the traditional cable rate formula (7.4%) and the “old” telecom rate formula (typically between 11.2% and 16.9%, depending on the average number of attaching entities). In fact, the Commission could identify its target – perhaps 10-12% of the cost for traditional wireline attachments – and invite comment on whether the target is the appropriate amount (fair to all stakeholders) and how to reach the target in a manner consistent with existing statutory constraints. So long as the net result of this process is within the range described above, this would, at least from the perspective of the Electric

Utilities, fairly resolve the dispute over the rate applicable to cable television system and telecommunications carrier attachments.³⁰

On the other hand, if the Commission's goal is to reduce the rate below the rates yielded by the existing cable and telecom rate formulas, this will present a statutory construction problem, an Administrative Procedures Act problem and a constitutional problem – all of which the Electric Utilities would intend to raise at the appropriate procedural juncture.

V. The Electric Utilities Support a 180-Day “Shot Clock” for Pole Attachment Access Complaints and Support Pre-Complaint Procedures Designed To Streamline The Complaint Process.

A. The Electric Utilities Support the Commission's 180-Day Shot Clock Proposal for Pure Access Complaints but the Commission Should Adopt the Reasons for Pausing the Shot Clock Included in the March 30, 2017 Version of the NPRM.

The Electric Utilities generally support proposed Rule 1.1425 establishing a 180-day shot clock for Commission resolution of pole access complaints. The Electric Utilities further support the proposition that “the Enforcement Bureau should be able to pause the proposed shot clock for a reasonable time in situations where actions outside the Enforcement Bureau's control are responsible for delaying its review of a pole access complaint.” (NPRM, ¶ 49). Additionally, the Electric Utilities agree that such situations should include “when the parties need additional time to provide key information requested by the Bureau . . . as well as when the parties decide to pursue informal dispute resolution or request a delay to pursue settlement discussions after a pole access complaint is filed.” *Id.* The Electric Utilities also view the additional reasons listed in the Commission's March 30, 2017 version of the NPRM as valid and important reasons for pausing the shot clock:

³⁰ The Commission could also invite comment on the myriad issues associated with determining pole attachment rates for wireless antenna attachments.

- when the parties engage in significant discovery or briefing of the disputed issues that prolongs the complaint process; or
- when the complaint involves large pole access requests of a complex nature that necessitate the Enforcement Bureau requests for significant additional information from the parties in order to resolve the complaint.

In the Matter of Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, FCC-CIRC1704-02, Proposed Notice of Proposed Rulemaking, ¶ 46 (March 30, 2017) (“March 30, 2017 Draft of NPRM”). The Electric Utilities request that the Commission include those additional reasons to pause the shot clock in any final Order on this NPRM.

To be clear, the Electric Utilities’ support for proposed Rule 1.1425 is not an implicit criticism of the Enforcement Bureau or its timeliness in resolving pole attachment disputes. The Electric Utilities hold the Enforcement Bureau’s hard work and professionalism in high regard. The Enforcement Bureau’s informal dispute resolution process, in particular, has yielded resolution of several complicated, high-stakes disputes involving the Electric Utilities—work that others in the Commission may never see or hear about due to its confidential, non-public nature. The Electric Utilities’ support for proposed Rule 1.1425 is, instead, a recognition of the special urgency attendant to true access disputes, and an appreciation for the limited circumstances under which proposed Rule 1.1425 would apply.³¹ Further, and though the 180-day period may compress the Enforcement Bureau’s (and the parties’) work, it will also give the Enforcement Bureau (and the parties) an additional tool and incentive to craft an early resolution to the dispute.

³¹ See NPRM, ¶ 47 n.65 (explaining that a “pole access complaint” for purposes of proposed Rule 1.1425 “is a complaint that alleges a complete denial of access” and does not include “a complaint alleging that unreasonable rates, terms, or conditions . . . (e.g., adherence to certain engineering standards) amounts to a denial of pole access”).

B. The Electric Utilities Support the Commission’s Adoption of Pre-Complaint Procedures and Propose an Additional Pre-Complaint Mediation Requirement.

The Electric Utilities also support the Commission’s establishment of the pre-complaint procedures set forth at proposed Rule 1.1404(k)(2). The Electric Utilities agree with the Commission’s judgment that a meeting between the parties prior to filing the complaint to resolve procedural issues and set deadlines will make the complaint process smoother and more efficient. (NPRM, ¶ 47). The Electric Utilities also concur with the Commission’s statement in the March 30 version of the NPRM that such pre-complaint meetings should include:

- discussing the need to exchange relevant documents and discovery and the timeframe for doing so;
- agreeing upon various case management issues, such as the entry of a protective order for the exchange of confidential information.

(March 30, 2017 Draft of NPRM, ¶ 47).

The Electric Utilities’ would also support a requirement that the parties engage in pre-complaint mediation, through the Enforcement Bureau or otherwise, or at least be required to discuss in good faith the possibility of mediation during the pre-complaint meeting. The Electric Utilities believe that pre-complaint mediation would save the Commission time and resources. Even if mediation is unsuccessful, it would likely help to narrow the focus of the parties’ dispute, which would aid in the streamlining of the complaint proceeding.

C. Other Disputes Are Too Varied to Apply a Uniform Shot Clock, But the Electric Utilities Would Not Oppose a 360-Day Shot Clock For Such Disputes If the Commission Believes a Deadline is Necessary at All.

The Commission also seeks comment on “whether the Commission should adopt a 180-day shot clock for pole attachment complaints other than those relating to access” and whether “the procedures set forth above for pole access complaints [should] also apply to other pole attachment complaints?” (NPRM, ¶ 51). A 180-day period for resolution of complaints

concerning matters other than pure access disputes is insufficient. Such matters not only lack the special urgency of access disputes, but also frequently involve substantial information and document gathering and exchange by the parties, and in some circumstances may require an administrative hearing. Such complex disputes also require in-depth review and analysis by the Commission, sometimes of voluminous pleadings and documents central to the dispute.

The varying nature of non-access disputes—which could range, for example, from disputes over engineering specifications, to ILEC adjustment rate payments, to CLEC or CATV rate disputes, to disputes over cost responsibility for audits, to disputes over multiple provisions of a recently-negotiated pole license agreement—counsels against the adoption of a universally applicable shot clock for such disputes. Should the Commission nevertheless be inclined to adopt a shot clock for non-access disputes, the Electric Utilities suggest a 360-day shot clock. Such a 360-day shot clock would have the benefit of corresponding with the 360-day deadline the Commission imposes upon state commissions to resolve pole attachment disputes before the matter reverts to the FCC’s jurisdiction. *See* 47 U.S.C. § 224(c)(3)(B)(ii).

CONCLUSION

The Electric Utilities value the opportunity to comment on these critical issues, and commend the Commission for its consideration of a one-touch make-ready solution in the communications space. If implemented with the proper parameters, one-touch make-ready could pave the way to a more efficient process that would benefit numerous stakeholders. The Electric Utilities also commend the Commission for addressing other matters related to the speed and predictability of broadband deployment. But the Electric Utilities have significant concerns with any proposal that undermines their ability to properly evaluate and engineer for new attachments. The Electric utilities are also extremely concerned with the Commission’s stated interest in

reducing cost recovery and creating disincentives for innovation and cooperation, as these policies would undermine, rather the promote, broadband deployment.

The Electric Utilities look forward to engaging further with the Commission on these important issues.

Respectfully submitted this 15th day of June, 2017.

/s/ Eric B. Langley

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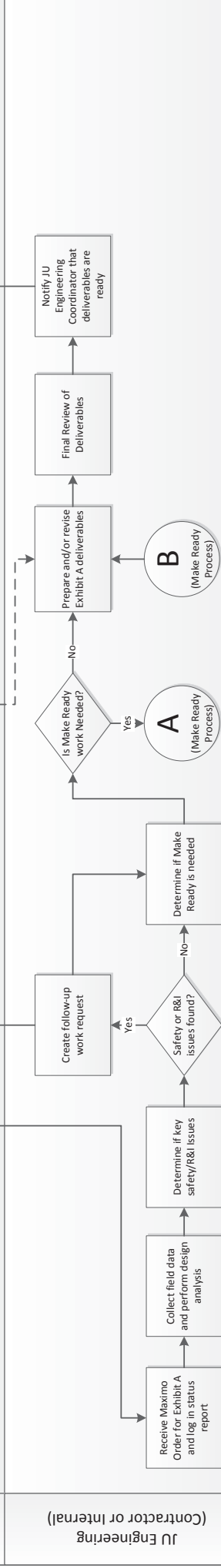
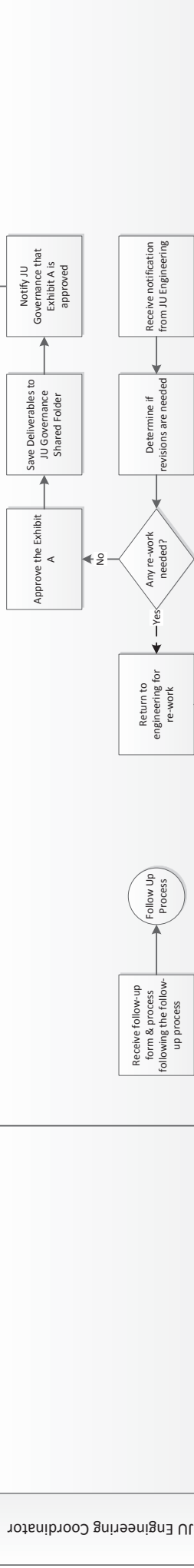
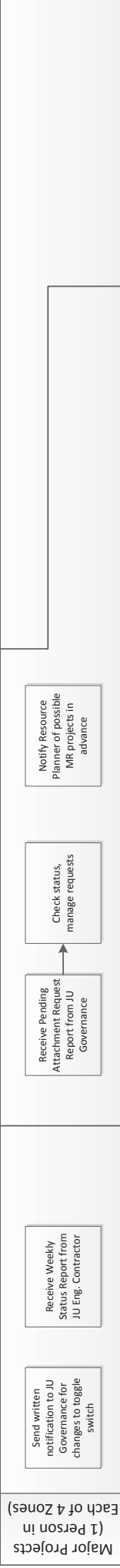
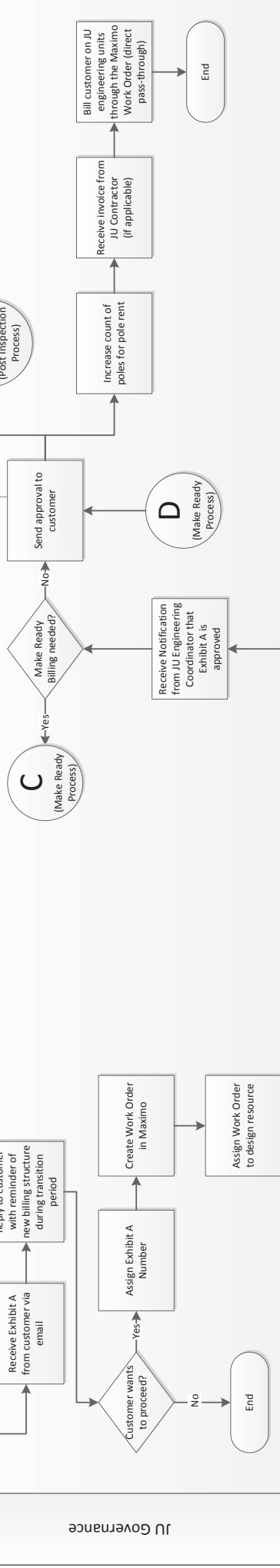
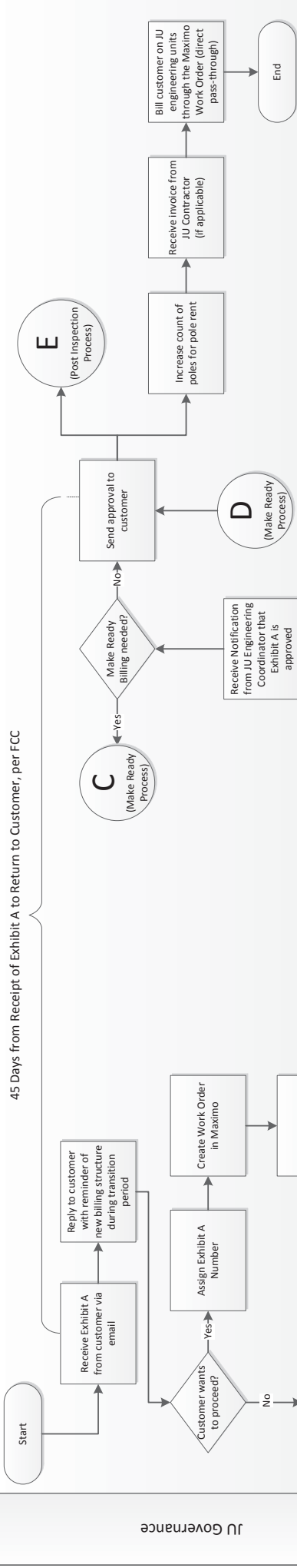
Email: eric@langleybromberg.com

Email: robin@langleybromberg.com

Counsel for Ameren Corporation, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company and Tampa Electric Company

Exhibit 1

Duke Energy Carolinas LLC Make-Ready Process Diagram



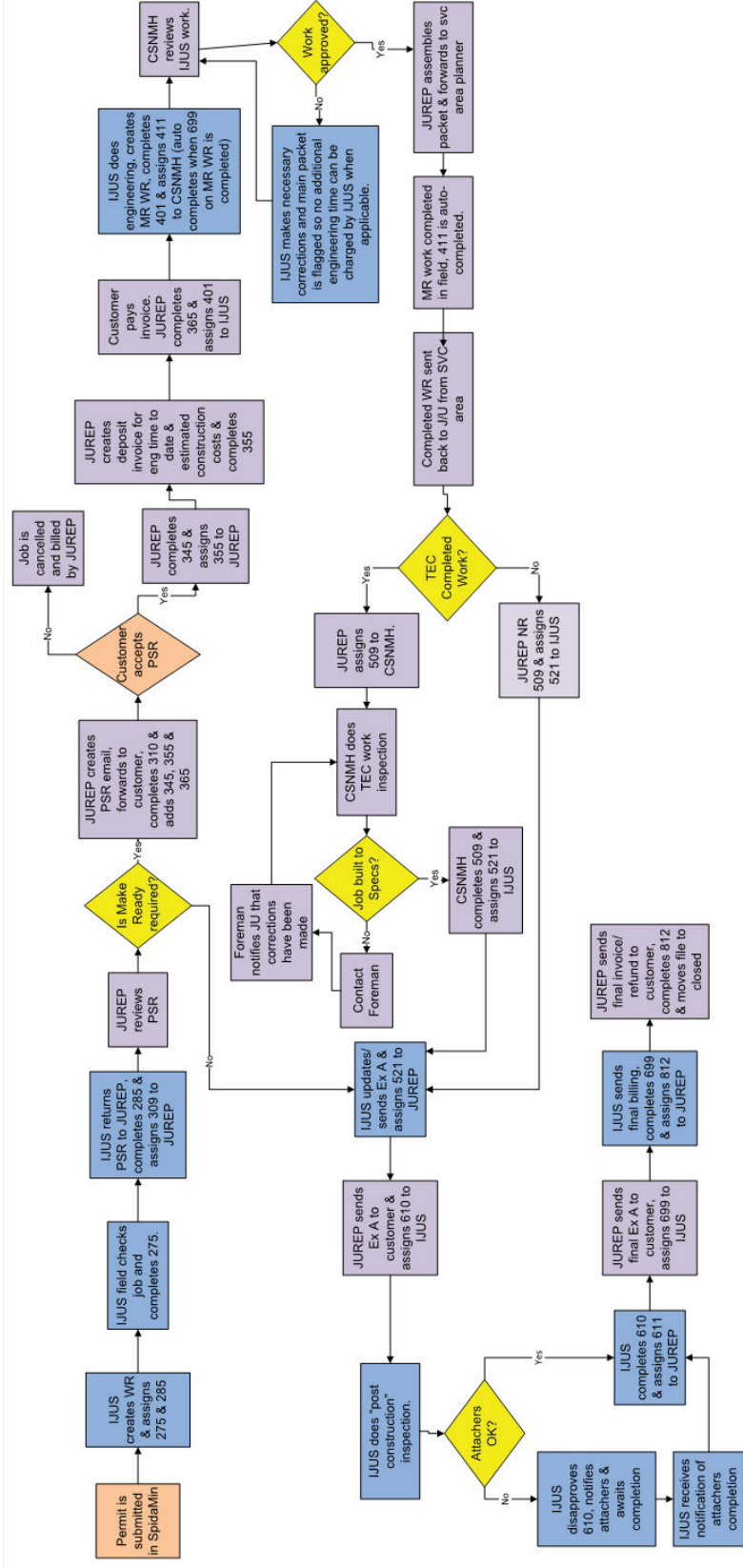
Tampa Electric Company
Make-Ready Process Diagram

Joint Use Make Ready Process

All team members will have back ups for all roles

See attached pages for examples of the different forms referenced in this process.

For the purposes of this process any number will refer to Work Pro requirements. See "Requirements Tab" for a list of their descriptions.



Oncor Electric Delivery LLC
Permit Application Process Diagram

